TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 241

ESTHER KAPLAN, APPELLANT,

vs.

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, ELLIS ISLAND, PORT OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED DECEMBER 14, 1931

(30,096)

(30,008)

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[fol. 1] IN UNITED STATES DISTRICT COURT

CITATION—In usual form, showing service on Wm. Hayward, omitted in printing

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[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATIONS AND ORDERS EXTENDING TIME

On the stipulation of the parties hereto annexed and for good cause, it is

Ordered that the time in which the petitioner above named may file the record on the appeal allowed herein to the United States Supreme Court be and the same is hereby extended to December 26th, 1923.

Alex. Gilchrist, Jr.

[fol. 3] It is hereby stipulated that the time within which the petitioner herein may file the record on appeal to the United States Supreme Court, shall be and the same is hereby extended to December 26th, 1923.

Dated, New York, December 11, 1923.

—— ——, Attorney for Petitioner. —— ——, United States Attorney, Attorney for Respondent.

[fol. 4] On the stipulation of the parties hereto annexed and for good cause, it is

Ordered that the time in which the petitioner above named may file the record on the appeal allowed herein to the United States Supreme Court be and the same is hereby extended to December 15th, 1923.

Learned Hand, United States District Judge.

[fol. 5] It is hereby stipulated that the time within which the petitioner herein may file the record on appeal to the United States Supreme Court, shall be and the same is hereby extended to December 15th, 1923.

Dated, New York, October 31st, 1923.

Elijah D. Zoline, Attorney for Petitioner. William Hayward, United States Attorney, Attorney for Respondent.

[fol. 6] IN UNITED STATES DISTRICT COURT

ESTHER KAPLAN, Relator,

against

ROBERT E. TOD, Commissioner of Immigration, Ellis Island, Port of New York, Respondent

ORDER DISMISSING WRIT OF HABEAS CORPUS AND ALLOWING APPEAL—Filed Oct. 9, 1923

This matter having come on to be heard on the petition for a writ of habeas corpus and the return to the said writ, and the Court having heard the arguments of counsel, finds that the writ of habeas corpus heretofore issued has not been sustained, and it is therefore

Ordered that the petition for a writ of habeas corpus be and the same is hereby dismissed, at petitioner's costs, and that the petitioner be remanded to the Commissioner of Immigration of Ellis Island, Port of New York.

Whereupon the petitioner, Esther Kaplan, presents her petition for appeal to the Supreme Court of the United States, accompanied by her Assignment of Errors, and in consideration thereof it is

Ordered that the appeal as prayed for, be and the same is hereby allowed to the Supreme Court of the United States and appearing to the Court that the citation was duly served as provided by law, it is

Ordered that the petitioner, Esther Kaplan, be admitted to bail pending the final determination of this appeal in the sum of One [fol. 7] Thousand ($1,000) Dollars, and that the appeal shall operate as a supersedeas.

Henry W. Goddard, United States District Judge.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Esther Kaplan, by Elijah N. Zoline, her attorney, and in connection with her petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the trial of the above entitled cause in said District Court, error has intervened to her prejudice, and this petitioner here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is a citizen of the United States and is wrongfully held and illegally imprisoned, and in dismissing her petition and remanding her into custody for deportation.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the 5th amendment of the Constitution of the United States.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for deportation.

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that she be ordered discharged.

Elijah N. Zoline, Attorney for Petitioner and Appellant.

[fol. 9] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS

The President of the United States of America to Honorable Robert E. Tod, Commissioner of Immigration at Ellis Island, Port of New York, Greeting:

We command you that you have the body of Esther Kaplan by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said Esther Kaplan may be called or charged before me, or one of the Judges of the United States District Court, Southern District of New York, in Room 235, Old Post Office Building, Borough of Manhattan, City of New York, on April 27th, 1923, at 10 a. m., to do and receive what shall then and there be considered concerning the said Esther Kaplan and have you then and there this writ.

Witness Honorable Learned Hand, Senior District Judge of the United States District Court at the Borough of Manhattan, City of New York, this 24th day of April, 1923.

Alex. Gilchrist, Jr., Clerk of the U. S. District Court for the Southern District of New York. (Seal.) Elijah N. Zoline, Attorney for Petitioner, 165 Broadway, New York City.

Writ allowed this 24th day of April, 1923. J. W. Mack, United States District Judge.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

And now comes Esther Kaplan and respectfully represents:

That on the 4th day of October, 1923, a judgment was entered by this court dismissing her petition for habeas corpus and remand-

ing her to the custody of the Commissioner of Immigration at Ellis Island, Port of New York, for deportation.

And your petitioner respectfully shows that in said record, proceedings and judgment in this cause lately pending against your petitioner, manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed from said judgment to the Supreme Court of the United States and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the court; that the petitioner may be admitted to bail pending the determination of the appeal in the said court.

Elijah N. Zoline, Attorney for Petitioner.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of said Court:

1. Your petitioner, Esther Kaplan, respectfully represents unto this Honorable Court that she is now unlawfully detained and imprisoned against her will by Robert E. Tod, Commissioner of Immigration at Ellis Island, Port of New York, under a warrant of deportation issued by Robe Carl White, Assistant Secretary of Labor of the United States, a copy of which is herewith attached and marked "Petitioner's Exhibit 1" and made a part of this petition.

2. Your petitioner further represents that the said immigration authorities were and are without jurisdiction to detain or deport your petitioner for the reason that she is now and since December 14, 1920, has been a citizen of the United States, and the jurisdiction of the said immigration authorities does not extend over citizens of the United States.

[fol. 12] 3. Your petitioner further avers that she was born at New Konstantyn Dub. Podolie, Russia, on September 10, 1901; that on the 20th day of July, 1914, she arrived in the United States of America, accompanied by her father and mother and has continuously resided with them in the United States from the date of her landing to the date of the verification of this petition; that on December 14, 1920, her father, Sam Kaplan, was duly admitted to citizenship of the United States of America, and a certificate of naturalization, No. 1,435,278, was duly issued to him on said date by the Supreme Court of New York County of the State of New York, as will appear from a certificate issued by the Clerk of the Supreme Court of New York County on March 3, 1923, which is attached to this petition, maked "Petitioner's Exhibit 2" and made a part hereof.

4. As further ground for relief, your petitioner avers that the warrant of deportation issued by the Secretary of Labor, as aforesaid, is void and without jurisdiction, for the reason that Section 19 of the Act of February 5, 1917, regulating immigration of aliens to, and residence of aliens in, the United States, limits the period of deportation of an alien to five years after entry. Your petitioner arrived in the United States on July 20, 1914, and the warrant for her deportation was not issued until January 19, 1923, more than five years after her entry into this country.

5. Your petitioner further avers that the order for her deportation would involve untold hardships upon her, inasmuch as she has no friends in the country from which she came and has no inde- [fol. 13] pendent means of support other than that of her parents, who, while able to maintain her in this country in their own home, will be unable to do so abroad.

6. Your petitioner, therefore, respectfully represents that her detention is illegal, unreasonable and unjust, and deprives her of liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States; that she has exhausted all remedies before the immigration authorities, and that her claim to citizenship has been denied by the Secretary of Labor. The correspondence relating to her claim to citizenship is herewith attached, marked "Petitioner's Exhibits 3, 4, 5, 6, 7, 8 and 9" and made a part of this petition.

Wherefore, petitioner prays that a writ of habeas corpus be issued directing Robert E. Tod, Commissioner of Immigration at Ellis Island, Port of New York, to produce the petitioner before this court to abide the further directions and judgment of the court, and that, upon a final hearing, the writ may be sustained and the petitioner released from custody and that, in the meantime, your petitioner be released on bail pending the final disposition of the writ of habeas corpus.

Esther Kaplan (in Yiddish), Petitioner. Elijah N. Zoline, Attorney for Petitioner.

[fol. 14] Jurat showing the foregoing was duly sworn to by Esther Kaplan omitted in printing.

[fol. 15] EXHIBIT 1 TO PETITION

United States of America, Department of Labor, Washington, D. C.

To the Commissioner of Immigration at Ellis Island or any officer or employee of the United States Immigration Service:

Whereas from proofs submitted, after due hearing before the Immigration Inspector, M. A. Pitt, held at Ellis Island, New York H. I am satisfied that the alien Esther Kaplan who landed at the Port of

N. Y., on the "S. S. Kursk" July 20th, 1914, is now found in the United States in violation of the Immigration authorities, on February 5, 1917, to wit: that she was feebleminded at the time of her entry and may be deported accordingly therewith.

I, Robe Carl White, Secretary, Assistant Secretary of Labor by virtue of power and authority vested in me by the laws of the United States hereby command that you return said alien to Ukrainia, the country whence she came at the expense of appropriations "Expenses of Regulations of Immigrants 1923." You are directed to purchase transportation for the alien from New York to her home in Ukrainia at the lowest available rate possible from the above named appropriation. Execution of this warrant is stayed until April 1, 1923, to afford her an opportunity to arrange her affairs.

Delivery of alien and acceptance for deportation will serve to cancel the bond executed March 2, 1922.

Witness my hand and seal this 19th day of January, 1923.
Robe Carl White, Secretary, Assistant Secretary of Labor.

[fol. 16] EXHIBIT 2 TO PETITION

SUPREME COURT, FIRST JUDICIAL DISTRICT, NEW YORK STATE

To whom it may concern:

This is to certify that the records of this Court show that one Sam Kaplan filed his Petition. No. 111876 to become a citizen of the United States of America in this the Supreme Court of the State of New York, First Judicial District on August 21, 1920.

In his petition he alleged under oath that he was born in Podolsk, Russia, on March 23, 1868; that he then resides at 249 Monroe Street, New York City, New York; that he emigrated to the United States from Liverpool, England, via Dominion, and arrived at the port of Phila., Pa. on August 6, 1911.

He also swore that he was attached to the principles of the Constitution of the United States, and that it was his intention to become a citizen of the United States and to renounce absolutely and forever all foreign aliegiance, and to permanently reside therein.

His petition further shows that at a hearing held in the Supreme Court, New York County, said petitioner was admitted to citizenship of the United States of America on December 14, 1920, and Certificate of Naturalization No. 1432278 was issued to him on the same date.

The aforesaid statements are issued solely for the purpose of proving his citizenship.

This is not a Certificate of Naturalization.

James A. Donegan, Clerk of the Supreme Court, New York County. (Seal.)

Dated: New York March 3, 1923.

[fol. 17] EXHIBIT 3 TO PETITION

March 14th, 1923.

Hon. T. R. Landis, Asst. Commissioner of Immigration, Ellis Island, New York.

DEAR SIR: In the matter of Esther Kaplein, also known as Esther Kaplan, it is my intention through some legal proceedings, to test the question of the validity of the warrant of deportation issued against her. It is my understanding that Miss Kaplein, through the naturalization of her father, is an American citizen, and that the warrant of deportation and the proceedings under it were and are wholly irregular. The case is an unusual one, for the reason that, if deported, Miss Kaplein would go to a place where she has no relatives or friends and no one to look after her.

In these circumstances, I will ask you to kindly facilitate me in obtaining the entire record in your office so that the facts may be stated in the petition as accurately as possible.

This letter will be handed to you by Miss Esther Tevers, who will transcribe such notes for me as may be necessary in this matter.

Assuring you that I will appreciate your courtesy, I am,

Yours very truly, E. N. Zoline. ENZ/MHB.

[fol. 18] EXHIBIT 4 TO PETITION

March 15, 1923.

Hon. T. R. Landis, Asst. Commissioner of Immigration, Ellis Island, New York Harbor, New York.

No. 98626/926

DEAR SIR: In the matter of Esther Kaplein, known also as Esther Kaplan, who by an order of the Department is ordered to be deported on April 1, 1923, I will ask you to kindly advise me whether at the hearing of this case or at any of the proceedings thereof, the question of the status of said Esther Kaplein or Kaplan, as a citizen of the United States through the naturalization of her father, Sam Kaplan, which took place on December 14, 1920, was considered, and what the ruling of the Department was thereon.

In the event this matter was not brought to the attention of the Department, I respectfully ask you to afford said Esther Kaplein a hearing upon the question of her citizenship.

For your information, I beg to advise you that Sam Kaplan, the father of Esther Kaplein, was admitted to citizenship of the United States by a judgment of the Supreme Court of New York County on December 14, 1920 and a certificate of naturalization, No. 1432278, was issued to him on the said date; that she arrived in the United States on the 20th day of July, 1914 and was then about 13

years of age. She has continuously resided in the United States with her parents, who became citizens of the United States. Accordingly, she is a citizen of the United States under Section 2172 of the [fol. 19] Revised Statutes of the United States, as construed in Boyd v. Nebraska, Ex rel Thayer, 143 U. S. 135, and other cases.

I am extremely anxious to avoid habeas corpus proceedings and will be glad to aid the Department and submit a brief to the Department on this question.

Should the Department decide that it will afford Miss Kaplein a hearing on the question of citizenship, then it will be necessary to reset the date of her deportation, which is now scheduled for April 1, 1923.

In any court proceedings it will be necessary to allege that all efforts before the Department have been exhausted, and to avoid any misapprehension upon this question, I am writing you this letter, and you will, of course, understand the spirit in which this letter is written.

An early reply will be appreciated.

Yours very truly, Elijah N. Zoline. ENZ/MHB.

[fol. 20] EXHIBIT 5 TO PETITION

March 16, 1923.

Secretary of Labor, Washington, D. C.:

Esther Kaplan whom you ordered deported on April first nineteen twenty-three is a citizen of United States through naturalization of her father who became citizen December fourteenth nineteen twenty. She arrived in this country at the age of thirteen and has continuously resided here with ther parents. Her status is defined by section twenty-one seventy-two of Revised Statutes of United States as construed in Boyd against Nebraska one forty-three United States one thirty-five. To avoid any misapprehension in this matter I will ask you to kindly grant a re-hearing and postpone date of deportation. An early reply will be appreciated.

Elijah N. Zoline, Attorney for Esther Kaplan, Woolworth Building.

[fol. 21] EXHIBIT 6 TO PETITION

U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

March 19, 1923.

Mr. Elijah N. Zoline, 1478 Woolworth Bldg., N. Y. City.

SIR: In reply to your letter of the 15th inst., you are informed that Esther Kaplein, accompanied by her mother, Chane Kaplein, ap-

plied for admission to the United States, ex SS "Kursk," July 20, 1914. She was certified to be feeble-minded, and was excluded and ordered deported. The mother was excluded as the accompanying alien. War conditions interfered with her deportation. The Hebrew Immigrant Aid Society, through their representative at Ellis Island, on June 9, 1915, applied for her temporary admission on a bond, guaranteeing that she will return to her native country when deportation thereto with safety and without hardship could be effected. This alien was temporarily admitted to the Hebrew Immigrant Aid Society on June 18, 1915, and failed to depart.

Esther Kaplein was again certified to be feeble-minded on Feb. 23, 1922. The matter was referred to the Bureau on Feb. 27, 1922, for further instructions, together with a copy of her father's naturalization certificate. Notwithstanding the father's naturalization, the Department issued its Warrant of Arrest for Esther Kaplein on March 17, 1922. It was served Oct. 27, 1922, and she was released on bond in the sum of $1,000, Nov. 2, 1922.

She was granted a final hearing in warrant proceedings Dec. 5, 1922, Attorney Samuel Mandelbaum, 277 Broadway, New York, appearing as counsel. The father, Samuel Kaplein, appeared as a witness in behalf of his daughter, and the record shows that he is a naturalized citizen. On Jan. 19, 1923, the Department issued its Warrant directing her deportation to Ukrainia, the country whence she came. The Warrant of Deportation, however, contains a provision staying deportation until Apr. 1, 1923, to afford her an opportunity to arrange her affairs.

The Department holds that naturalization of the father does not confer citizenship upon the minor children, who have not been permanently admitted into the United *does not confer citizenship upon*
[fol. 22] *the minor children, who have not been permanently admitted into the United* States, though temporarily residing therein. A writ of habeas corpus sued out in a like case within the year, was dismissed, no opinion being handed down.

There is nothing this office can do in the matter and deportation will be proceeded with after April 1, 1923.

Respectfully, H. S. Landis, Assistant Commissioner. (B. S. I. & Appeals). R.W. RW/HF.

[fol. 23] EXHIBIT 7 TO PETITION

40W MR. 256PM 46 Collect 2EX Count QN.
Dx Washington DC March 20 1923.
(Street and No.:) N. Y., 253 B'way. Tel. Barclay 6700.
To Elijah N. Zoline,
(Place:) Woolworth Bldg., New York, N. Y.:

Mar. 20, 3.20 P. M., '23.

Deportation Esther Kaplein stayed until April first As girl mentally defective she cannot "reside permanently in the United States"

as required under section five act March second nineteen hundred and seven in order to acquire citizenship through father's naturalization Boyd versus Nebraska inapplicable.

E. J. Henning, Asst. Secretary.

[fol. 24] EXHIBIT 8 TO PETITION

March 20, 1923.

Hon. E. U. Henning, Asst. Secretary of Labor, Washington, D. C.:

In re deportation Esther Kaplan act March second nineteen seven inapplicable stop. See United States against Todd two eighty-five Federal five twenty-three Second Circuit where similar situation arose stop Will appreciate your extending date of deportation to April fifteenth to enable me to prepare petition for writ of habeas corpus stop Hope you will reconsider in view of above decision stop Kindly wire me.

E. N. Zoline, Woolworth Bldg.

[fol. 25] EXHIBIT 9 TO PETITION

U. S. Department of Labor, Bureau of Immigration, Washington

Address reply to Commissioner General of Immigration and refer to No. 53798/292.

March 22, 1923.

E. N. Zoline, Esq., Attorney at Law, Woolworth Building, New York, N. Y.

DEAR SIR: In reply to your telegram of the 20th instant, you are advised that the case of the United States ex rel. Sejnensky v. Tod, 385 Fed. 523, in the opinion of the Bureau, does not support your contention that Esther Kaplein is a citizen of the United States by virtue of the naturalization of her father. In that case the woman herself married an American citizen, prior to the Cable Act, and the Court held that, as a result of such marriage, she was a citizen of the United States.

The case of Esther Kaplein is governed by the Act of March 2, 1907. Section 5 thereof reads as follows:

"That a child born without the United States of alien parents shall be deemd a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent; provided, that such naturalization or resumption takes place during the minority of such child; and provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

In the case cited by you there is no reference made therein that the status of a minor child of a naturalized citizen is not subject to

the qualifications that "such minor child shall begin to reside in the United States permanently as a condition to citizenship.

As your client was feebleminded at the time of her entry, and is in the United States unlawfully as a result of her failure to leave the country at the expiration of her temporary admission, it cannot be said "that she is residing here permanently."

Very truly yours, W. W. Sibray. W. W. Sibray, Assistant Commissioner-General.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

Edward Zocke, being duly sworn, says that he is and during all the times herein mentioned has been an immigrant inspector in the service of the United States, that he is attached to the Law Department of the Immigration Service of the United States at Ellis Island, New York; that he in his official capacity is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in her own proper person produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

[fol. 27] (a) The petition does not allege facts to show that the proceedings of the Department of Labor upon which was issued the warrant of deportation pursuant to which the said alien is held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute;

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Labor upon which the warrant of deportation was issued;

(c) It is not alleged that there was no evidence before the Department of Labor upon which it based or could have based its findings and conclusion in accordance with which the warrant of deportation was issued;

(d) It does not appear by allegation of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Labor adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Labor of the United States with respect to the above-named alien, copies of which are produced and filed herewith as part of this return;

[fol. 28] (1) The alien, Esther Kaplan, arrived at the Port of New York on July 20, 1914. According to the testimony of her father she is now twenty or twenty-one years of age, and according to her age as given at the time of her arrival in the United States, her age in December 1922 would be twenty-two years. On arrival in the United States she was certified by the Public Health authorities as being feeble-minded, was excluded and ordered deported, there being no appeal from orders of exclusion in feeble-minded cases to the Secretary of Labor. Under date of October 7, 1914, the alien's mother, who was excluded by the Board as an accompanying alien, and the alien's brother, who was excluded as a person likely to become a public charge, were admitted on public charge bond conditioned upon their departure from the United States with the alien at such time as her deportation might be effected. May 19, 1915 the Department directed that deportation be proceeded with of all the aliens concerned, in accordance with the previous decision rendered. Deportation was obstructed by the war, in view of which the Department authorized the alien's temporary admission until such time as deportation could be effected with safety, paroling her to the custody of the Hebrew Immigrant Aid Society of America June 18, 1915, who agreed to act as custodian of the alien, to return her when required, and to prevent her becoming a public charge. February 18, 1922 the alien was reexamined medically and was again certified to be feeble-minded. The facts were placed before the Bureau, resulting in the issuance of a warrant for the alien's arrest. March 18, 1922, she was taken into custody and accorded the usual hearing; was medically examined, resulting in affirmation of the previous certificates issued against her, to the effect that she was feeble-minded, further setting forth that special care and attention would be required enroute. The Department issued its warrant [fol. 29] January 19, 1922, directing deportation to Ukraine, but authorized a stay of Deportation until April 1, 1923, to afford the alien opportunity to arrange her affairs.

(2) The respondent, Robert E. Tod, respectfully alleges, as more fully appears by the record, a copy of which is hereto annexed and made a part of this return, that the alien was duly accorded a hearing at Ellis Island on October 30, 1922. To afford her an opportunity to engage counsel and by agreement with counsel after he had been engaged, the hearing was several times adjourned. It was concluded at Ellis Island, December 5, 1922, the alien having been represented by attorney, Samuel Mandelbaum of 277 Broadway, New York City. The warrant of arrest was read and explained to the alien and to counsel.

(3) Pending further proceedings the alien was on November 2, 1922 released under bond in the amount of $1,000.

(4) As appears by the minutes and exhibits aforesaid, the said alien was duly informed and apprised of the charges against her; that said alien was afforded a full, complete and fair hearing by the Department of Labor upon said charges; the said alien was afforded a full, complete and fair opportunity to answer and to submit evidence upon such charges; there was before the Department of Labor evidence to sustain each of said charges; the Department of Labor duly found that the charges were sustained; and said charges were in fact fully sustained by the proofs that were before and were considered by the Department of Labor.

(5) The respondent, Robert E. Tod, respectfully denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegation of the petition marked and numbered "5," and respectfully denies each and every allegation of the petition marked and numbered "2," "4" and "6."

[fol. 30] Wherefore, deponent prays that the writ of habeas corpus herein be dismissed and the said alien remanded to the custody of the Commissioner of Immigration at Ellis Island, New York, N. Y., to be dealt with in accordance with the said order of exclusion.

Edward D. Zucker.

Sworn to before me this 4 day of May, 1923. Carl Brecher, Notary Public, Kings County. Clerk's No. 429. Register's No. 5037. N. Y. Co. Clk.'s No. 69. Reg. No. 5190. Commission expires March 30, 1925. (Seal.)

[fol. 31]

EXHIBIT TO RETURN

Bureau of Immigration Form 8 B

WARRANT—DEPORTATION OF ALIEN

United States of America, Department of Labor, Washington

No. 53798/292

To Commissioner of Immigration, Ellis Island, N Y. H., or to any Officer or Employee of the U. S. Immigration Service:

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector M. A. Pitt, held at Ellis Island, N. Y. H., I have become satisfied that the alien Esther Kaplein, who landed at the port of New York, N. Y., ex S. S. "Kursk," on the 20th day of July, 1914, has been found in the United States in violation of the immigration act of February 5, 1917, to wit: That she was feeble-minded at the time of her entry, and may be deported in accordance therewith:

I, Robe Carl White, Second Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Ukrainia, the country whence she came, at the expense of the appropriation [fol. 32] "Expenses of Regulating Immigration, 1923." You are directed to purchase transportation for the alien from New York, N. Y., to her home in Ukrainia at the lowest available rate, payable from the above-named appropriation. Execution of this warrant should be stayed until April 1, 1923, to afford her an opportunity to arrange her affairs. Delivery of the alien and acceptance for deportation will serve to cancel the bond executed November 2, 1922. For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 19th day of January, 1923.
(Signed) Robe Carl White, Second Assistant Secretary of Labor. JF.

[fol. 33] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor

No. 98626/926

Commissioner General of Immigration, Washington, D. C.:

In re Esther Kaplein—Warrant No. 55798/292

The inclosed record of hearing relates to the case of Esther Kaplein, native of Ukrainia, single, of Hebrew race, who entered the United States at the port of New York as a passenger on the S. S. "Kursk" July 20, 1914. It appears that her age is from 20 to 22 years. Under the above-numbered warrant she was accorded a hearing at Ellis Island Oct. 30, 1922. To afford her opportunity to engage counsel, and by agreement with counsel after he had been engaged, the hearing was several times adjourned. It was concluded at Ellis Island Dec. 5, 1922, the alien having been represented by Attorney Samuel Mandelbaum, of 277 Broadway, New York City. Charge: Deficient. No other charge. Warrant was read and explained to alien and to counsel.

Pending further proceedings the alien was on Nov. 2, 1922, released under bond in the amount of $1,000. She is residing with her parents, Sam and Chana Kaplein, first floor, 249 Monroe Street, New York City.

On arrival in the United States the alien was certified as feebleminded, was excluded and ordered deported. The department, however, authorized her temporary admission—until her deportation could be effected with safety. Although the conditions which originally prevented her deportation with safety—war conditions—no

longer exist, the alien has failed to depart from the United States. Hence issuance of the warrant for her arrest.

Counsel submits no brief.

I recommend deportation.

(Signed) H. R. Landis, Assistant Commissioner, in Charge B. S. I. and Appeals. M. A. P.

Incls. 30645.

[fol. 34] Treasury Department, U. S. Public Health Service

(98626/926. Copy RA)

Hospital No. 43, Ellis Island

MEDICAL CERTIFICATE

JJL/33. October 28, 1922.

Alien Esther Kaplein; aged 14; nativity Russia; ex S. S. "Kursk," 7-20-14.

Pursuant to the order of the Chief Medical Officer and the request of the Asst. Commissioner, a board was convened today for the re-examination of the above named alien. The board has examined her and find that she is feebleminded. The certificates of July 21, 1914 and February 23, 1922 are hereby confirmed.

In her present physical condition she is able to travel without danger to life but in the event of deportation special care and attention will be required en route.

R. L. Allen, Surgeon, P. H. S., Chairman. J. J. Loughran, A. A. Surgeon, P. H. S., Member. T. W. Glass, A. A. Surgeon, P. H. S., Recorder.

Respectfully referred to the Commissioner of Immigration re 98626/926. G. M. Corput, Act. Chief Medical Officer.

[fol. 35] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

No. 98626/926

Dec. 29, 1922.

Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.:

As instructed, I on Oct. 30, 1922, at Ellis Island, served Department warrant of arrest No. 53798/292 of Mar. 17, 1922, on the alien Esther Kaplein, ex S. S. "Kursk," New York, N. Y., July 20, 1914. I informed her of the purpose of the warrant and of her right to show cause, through lawyer or otherwise, why she should not be

deported. After several adjournments the hearing was concluded at Ellis Island Dec. 5, 1922, the alien having been represented by Attorney Samuel Mandelbaum, of 277 Broadway, New York City.

On arrival in the United States the alien was certified as feebleminded, was excluded and ordered deported. The Department, however, authorized her temporary admission—until her deportation could be effected with safety. Although the conditions which originally prevented her deportation with safety—war conditions—no longer exist, the alien has failed to depart from the United States. Hence issuance of the warrant for her arrest.

Pending further proceedings the alien was on Nov. 2, 1922, released under a bond in the amount of $1,000. She is residing with her parents, 249 Monroe Street, New York City.

Foreign address: Claims none.

Passport: Unable to locate it, according to the testimony.

Property: None.

Money, baggage: No money. Only baggage are clothes and other [fol. 36] personal effects in care of parents, Sam and Chana Kaplein, first floor, 249 Monroe Street, New York City.

Medical certificate dated Oct. 28, 1922: Hereto attached showing mental condition, ability to travel, and that in case of deportation special care and attention will be required.

Counsel submits no brief.

For record of hearing see next page.

[fol. 37] Record of Hearing in Case of Esther Kaplein

Ex S. S. "Kursk," New York, N. Y., July 20, 1914

Arrested under Warrant No. 53798/292, issued Mar. 17, 1922, by the Secretary U. S. Department of Labor.

Charge: That she was feebleminded at the time of her entry.

Ellis Island,
New York Harbor, N. Y., Oct. 30, 1922.

Alien, Esther Kaplein, cautioned to tell the truth and examined by Inspector M. A. Pitt, of U. S. Immigration Service, testified as follows:

(Examination conducted through Interpreter S. A. Radwaner, of Ellis Island.)

Q. What is your name and address?

A. Esther Kaplein, 249 Monroe Street, New York City.

Q. Of what country are you a citizen?

A. Russia.

Q. I show you warrant No. 53798/292, issued Mar. 17, 1922, by the Secretary, U. S. Department of Labor, for your arrest for the reason that you were feeble minded at the time of your entry into [fol. 38] the United States. I also show you record of board of special inquiry held at Ellis Island July 22, 1914, in your case;

record of board of special inquiry held at Ellis Island July 23, 1914, in case of Choma Kaplein; and bond on Immigration Form 554. The purpose of the hearing under the warrant is to afford you opportunity to show cause, if any there be, why you should not be deported. Under the law you have the right to be represented by counsel. Do you wish to be so represented?

A. I think my father wants to engage a lawyer to represent me. I would like to have time to confer with him on that point.

Q. At your request this hearing is adjourned to 11:30 a. m., Nov. 6, 1922, in the Law Office, Ellis Island.

A. I understand.

Hearing adjourned to Nov. 6, 1922, at Ellis Island.

Ellis, Island,
New York Harbor, N. Y., Nov. 6, 1922.

Hearing adjourned to Dec. 5, 1922, at 1:30 p. m., in the Law Office, Ellis Island.

Ellis, Island,
New York Harbor, N. Y., Nov. 23, 1922.

Hearing adjourned to Dec. 1922, at 1:30 p. m., in the Law Office, Ellis Island.

[fol. 39]

Ellis Island,
New York Harbor, N. Y., Dec. 5, 1922.

Present: Inspector M. A. Pitt, of U. S. Immigration Service; Attorney Samuel Mandelbaum, of 277 Broadway, New York City, representing the alien as counsel; Interpreter N. Driller, of U. S. Immigration Service; Esther Kaplein, alien under arrest; (when called) Sam Kaplein, witness.

Alien ESTHER KAPLEIN, recalled and examined by Inspector Pitt, testified as follows:

(Examination conducted through the Interpreter.)

Q. The hearing in your case is now resumed. Is anybody here to represent you as counsel?

A. Yes, Attorney Samuel Mandelbaum is now present to represent me as counsel.

(NOTE.—Counsel is shown warrant of arrest, record of Board of Special Inquiry held at Ellis Island, July 22, 1922, and record of Board of Special Inquiry held at Ellis Island July 23, 1922; also bond on Immigration Form 554, and minutes of the warrant hearing in so far as it has proceeded.)

Q. With whom are you residing at 249 Monroe Street, New York City?

A. My father, Samuel Kaplein.

Q. Of what race are you?
A. Hebrew.
Q. Are you employed?
A. No.
Q. Have you been employed recently?
A. Yes, at New York, on Monroe St.—249. I don't know the name of the employer. My work is buttoning waists.
[fol. 40] Q. What was your salary, and when did you leave that employment?
A. I left that place of employment this week. I don't know what my salary was.
Q. How long were you employed there?
A. Since day before yesterday.
Q. What is your age?
A. Twenty years.
Q. Where were you born?
A. New-Konstantyn Dub. Podolie, Russia.
Q. Near what important or big city is that?
A. There is no other city there.
Q. Have you a birth certificate?
A. My father and mother have it.
Q. Are you married?
A. Single.
Q. Were you ever married?
A. No.
Q. Since your arrival in the United States, have you been employed at any other place than 249 Monroe Street, to which you referred a while ago?
A. Yes, I worked for Budin Bros., at Scamell Street, New York City.
Q. What did you do there and what was your salary?
A. Buttoning waists. My father received my pay.
Q. How long were you employed there?
A. Four weeks.
Q. When, where and on what vessel did you arrive in the United States?
A. On the steamer "Kursk," before the war broke out, at New York.
Q. Do you remember the month and year of arrival?
A. It was eight years on the 20th of July last.
Q. Who paid your passage to the United States?
A. My father.
[fol. 41] Q. In what class and from what port did you arrive?
A. I don't know.
Q. Where was your last permanent residence immediately before your embarkation for the United States?
A. (No answer.)
Q. Where was your last permanent residence immediately before your embarkation for the United States?
A. (No answer.)
Q. Were you ever in the United States before?

A. Yes.
Q. When and where?
A. My grandmother went to the Steamer "Kursk" and the ship drowned. Then my father took me to America.
Q. Have you a passport?
A. My father has it.
Q. What relative have you in the United States?
A. Cousins and female cousins.
Q. Who is the nearest relative you have outside the United States?
A. No one.
Q. Have you ever declared your intention to become a citizen of the United States?
A. Yes.
Q. When and in what court or where?
A. When I came to America. My father knows.
Q. Have you any citizenship papers—either declaration of intention or certificate of naturalization?
A. My father has it.
Q. Have you ever been a public charge since your arrival in the United States?
A. What do you mean by public charge?
Q. By public charge I mean, have you been for any reason supported by public funds—in other words, at public expense?
A. My mother gave me clothes and bought me slippers.
[fol. 42] Q. Have you been a recipient of charity since your arrival in the United States?
A. No.
Q. Have you any money?
A. No.
Q. Have you any property or baggage?
A. No.
Q. Have you attended school since your arrival in the United States?
A. Yes.
Q. What school?
A. Henry Street school.
Q. How ling did you attend that school and when did you leave?
A. Two summers.
Q. When did you leave there?
A. Last summer.
Q. What grade were you in when you left there?
A. Grade B.
Q. Was it night or day school?
A. Night school.

By Inspector Pitt: Introduced in evidence, made a part of the record and shown counsel, are medical certificates of the United States Public Health Service dated Feb. 23, 1922, and Oct. 28, 1922, marked "Government Exhibits A-1 and A-2.)

Q. Have you any further statement to make as to why you should not be deported?

A. I have nobody over there. Everybody is coming to America. Why should I go back? I want to be with my mother and father, and I have no one to go back to. There is no relative there.

Inspector Pitt to Attorney Mandelbaum: Do you wish to ask the alien any questions?
[fol. 43] Attorney Mandelbaum: Yes.

Attorney Mandelbaum to alien:

Q. Are you now living with your mother and father?
A. Yes.
Q. And your mother and father are supporting you?
A. Yes.
Q. And you never had any trouble with any public authorities or public officials?
A. No.
Q. And you are peaceful and law abiding?
A. Yes.

Witness SAM KAPLEIN, sworn and examined by Inspector Pitt, testified as follows:

Q. What is your name and address?
A. Sam Kaplein, first floor, 249 Monroe Street, New York City.
Q. What is your business and where?
A. I work in a brass factory.
Q. Of what country are you a citizen?
A. United States.
Q. Where were you born?
A. I was born in Russia.
Q. Have you a certificate of naturalization?
A. My paper is at home. A copy of it was delivered at the Bond Office on Ellis Island to be sent to Washington.
Q. When did your naturalization become effective?
A. It will be two years on the 14th of this month. I obtained the paper at the Supreme Court, City Hall, New York City, Part Six.
[fol. 44] Q. Are you the father of this lady (pointing to alien under arrest)?
A. Yes.
Q. When was she born?
A. September—I don't remember the exact date. I believe it was in 1901 or 1902. She was entered on my citizenship paper as being nineteen years of age.
Q. Is she residing with you?
A. Sure.
Q. Is she employed?
A. No. She is taking care of the house.
Q. Ha- she been employed recently?
A. No, we never sent her to work since her arrival in the United States.

Q. Has she attended school?
A. A few days only.
Q. What school was that?
A. Henry Street School.
Q. When did she leave there?
A. About a year ago.
Q. Night school or day school?
A. Night school.
Q. Since her arrival in the United States has she been a public charge?
A. No. I am supporting her, giving her clothes and food.
Q. Since her arrival in the United States has she been a recipient of charity?
A. God forbid.
Q. Has she money?
A. No.
Q. Has she any property or baggage?
A. No, except clothes and certain personal effects at my home.
Q. Who is the nearest relative she has outside the United States?
A. No one.
[fol. 45] Q. Give the complete name of her birthplace?
A. Novo-Konstantynow, Province of Podolie, Russia.
Q. Near what important or big city is that?
A. Quite a distance from Kiev and Odessa, Russia.
Q. Did your daughter Esther ever declare her intention to become a citizen of the United States?
A. No.
Q. Have you any passport or birth certificate belonging to her?
A. No. I have not got it any more. It is a long time since I came here from Europe. I must have lost it.
Q. The warrant in this case charges that she is in the United States in violation of law in that she was feeble-minded at the time of her entry. Have you any statement to make as to why she should not be deported?
A. I wish to say that she is not a burden to the public.

Inspector Pitt to Attorney Mandelbaum: Have you any questions to ask the witness?
Attorney Mandelbaum: Yes.

Attorney Mandelbaum to witness:

Q. How does you daughter behave herself at home?
A. Very peacefully.
Q. Has she ever given you or your wife or anyone any trouble?
A. No—no one. All the tenants in the house can testify to it.
Q. From the time that your daughter arrived on July 20, 1914, up to now, has your daughter been under your personal care and supervision?
A. Yes.
Q. What does your daughter do at home?

A. She works at home; she washes the floors, dishes, laundry, and assists my wife in the house.

[fol. 46] Q. Mr. Kaplein, what do you earn a week?

A. I earn regularly $22 a week, and sometimes more in addition.

Q. Are you enjoying good health?

A. Yes, I was never sick since I have been in America. I never was in a hospital.

Q. Are you employed steadily?

A. Yes.

Q. Have you any money in bank?

A. No, I have about $20 or $30 at home.

Q. Did you ever apply for support for any charity for her—your daughter?

A. No.

Q. Did you ever apply to your friends or relatives for support or charity?

A. No.

Q. Do you ever intend to leave the United States?

A. No.

Q. You have adopted this country as your country to live in?

A. Yes, I love this country and intend to remain here forever.

Q. Have you a son or daughter that resides with you in your house that helps to support the family?

A. Yes, I have a son who works and contributes from his salary weekly.

Q. How much?

A. $10 to $12 a week.

Q. How old is he?

A. Twenty-three years of age.

Q. Have you any relatives in Russia or in any part of the country?

A. No.

Q. Are you willing to take care of and support your daughter?

A. Yes, all my life.

[fol. 47] Q. Are you willing to give a further bond in any reasonable sum to avoid her becoming a public charge?

A. Yes.

[fol. 48] Summary

The alien Esther Kaplein entered the United States at the port of New York, July 20, 1914, as a passenger on the S. S. "Kursk." Accordingly to the testimony of her father, Sam Kaplein, she is now 20 or 21 years of age. According to her age as given at the time of her arrival in the United States, her present age is 22 years. She is a native of Russia, is of Hebrew race and single. On arrival in the United States she was certified as feeble-minded, was excluded and ordered deported, The Department, however, authorized her temporary admission—until her deportation could be effected with safety. Although the conditions which originally prevented her deportation with safety—war conditions—no longer exist, the alien

has failed to depart from the United States. Hence issuance of the warrant for her arrest.

The alien under Department warrant of arrest, of Mar. 17, 1922, No. 53798/292, was accorded a hearing at Ellis Island Oct. 30, 1922. To afford her opportunity to engage counsel, and by agreement with counsel after he had been engaged, the hearing was several times adjourned. It was concluded at Ellis Island Dec. 5, 1922, the alien having been represented by Attorney Samuel Mandelbaum, of 277 Broadway, New York City.

On Nov. 2, 1922, the alien was released under a $1,000 bond, conditioned for her production if and when wanted for further hearing, for deportation, or for any other reason. She is residing with her parents, 249 Monroe Street, New York City.

The alien's father, as stated hereinbefore, is Sam Kaplein. Her mother is Chana Kaplein.

Counsel submits no brief.

Recommendation

It is assumed that the Department, in issuing its warrant, was aware that more than five years had elapsed since the alien's arrival [fol. 49] in the United States. It is my opinion that the charge in the warrant has been sustained by the evidence. I therefore recommend Deportation.

M. A. Pitt, Immigrant Inspector.

[fol. 50] Bureau of Immigration Form 8 A

Warrant—Arrest of Alien

United States of America, Department of Labor Washington

No. 53798/292

To Commissioner of Immigration, Ellis Island, N. Y. H., or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Esther Kaplein, who landed at the port of New York, N. Y., ex S. S. "Kursk," on the 20th day of July, 1914, has been found in the United States in violation of the immigration act of February 5, 1917, for the following among other reasons: That she was feeble minded at the time of her entry.

I, James J. Davis, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant her a [fol. 51] hearing to enable her to show cause why she should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation, "Expenses of Regulating Immigra-

tion, 1922." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $1,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 17th day of March, 1922.

(Signed) James J. Davis, Secretary of Labor. J. G. C.

[fol. 52] (Copy. RA.)

U. S. Department of Labor, Immigration Service.

Office of Commissioner of Immigration, Ellis Island, New York Harbor

No. 98626/926

260. February 27, 1922.

Commissioner General of Immigration, Washington, D. C.:

In re Esther Kaplein, ex S. S. "Kursk," July 20, 1914. Certified to be feebleminded, but paroled by directiion of the Department to the custody of the Hebrew Sheltering and Immigrant Aid Society. Bureau No. 53798/292.

Alien was brought to Ellis Island on the 23rd instant and was certified again to be feebleminded. She resides with her parents at 249 Monroe Street, New York City, and the father has secured naturalization papers, copy of which is attached. Further instructions are requested.

(Signed) H. R. Landis, Assistant Commissioner, In Charge B. S. I. and Appeals. EK. Inclosed 17229.

[fol. 53] (98626/296. Copy RA.)

Hebrew Sheltering and Immigrant Aid Society of America

Office of Samuel Littman, Representative U. S. Immigration Station, Ellis Island, N. Y. H.

In Answering, please refer to our No. 31.

June 18, 1915.

Hon. Frederick C. Howe, Commissioner of Immigration, Ellis Island, N. Y. H.

Sir: In reply to the Communication of June 14, 1915, signed by the assistant Commissioner, file No. 98626, concerning the case of Esther Kaplan ex S. S. Kursk 7/20/14, I beg to state that I have been directed by my Society to accept the custody of the said Esther Kaplan until she can be safely deported, to return her when required and meanwhile prevent her from becoming a public charge.

We are now ready to accept her under the above conditions.

Respectfully, (Signed) Samuel Littman, Representative.

[fol. 54] (98626/296. Copy. RA.)

U. S. Department of Labor, Bureau of Immigration, Washington

In answering refer to No. 53798/292.

June 12, 1915.

Commissioner of Immigration, Ellis Island, N. Y. H.:

Referring to your letter of the 10th instant (98626/926), concerning the case of Esther Kaplan, you are advised that the Assistant Secretary has rendered the following decision with respect to the above-named alien:

If the Hebrew Sheltering and Immigrant Aid Society will stipulate to become custodian of the child until she can be safely deported, to return her when required, and meanwhile to prevent her becoming a public charge, they will be appointed such custodian.

Please advise the Bureau promptly whether or not such an arrangement is entered into.

(Signed) Alfred Hampton, Acting Commissioner-General.

MGC.

[fol. 55] (98626/296. Copy. RA.)

TELEGRAM

Postal Telegraph-Commercial Cables

Clarence H. Mackay, Pres.

16 ny pn 27 Govt 41op.
BR Wash DC May 19th.

Imgtn. Service, Ellis Island, N. Y.:

Chana Kaplein and children mentioned your letter yesterday may now be deported in accordance with original decision and bond submitted their behalf.

Post.

[fol. 56] (98626/926. Copy. RA.)

U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

U. S. Department of Labor, Bureau of Immigration, Washington

In Answering Refer to No. 53798/292.

September 28, 1914.

Commissioner of Immigration, Ellis Island, N. Y.:

Referring to your No. 98626/926, you are advised that, pursuant to a request filed here by Mr. Simon Wolf, of this city, the Acting

Secretary has modified the previous decision in the case of Chane Kaplein and child Schmuel and has directed their admission under a joint and several bond of $1,000 for the two guaranteeing their departure with the feeble-minded child Ester when the latter's deportation can be effected.

(Signed) F. H. Larned, Assistant Commissioner-General.
CTH.

[fol. 57] (98626/926. Copy. RA.)

U. S. Department of Labor, Bureau of Immigration, Washington

53798/292-406. August 24, 1914.

Acting Commissioner of Immigration, Ellis Island, N. Y.:

The Acting Secretary has directed the admission of Chane Kaplein and child (your 98626/926) provided bond is furnished for each, that for the child to be in the sum of $1,000, providing for departure at the expiration of a year or sooner and without expense to the Government and, in the child's case, also that she will be confined in an institution adapted to the treatment of her disability.

In the Freide Guttman, brother and sister case (your 98628/215), the Acting Secretary's decision is that the aliens be landed under public charge bonds guaranteeing they will depart at the expiration of a year, or sooner if directed by the Department, the bond for Chaje to be in the sum of $1,000 and to contain the additional stipulation that she will be given special care and attention in an institution adapted to the treatment of her disability and, further, that in the event her sister Freide does not go back as an *an* attendant the charges incident to the procurement of a substitute will be met.

(Signed) F. S. Learned, Acting Commissioner-General.
CAS.

[fol. 58] (98626/926. Copy. RA.)

Western Union Telegram

71 NY SS 19 GOVT.
BR WASHN DC AUG 3-14.

Immigration service, Ellis Island, N. Y.:

Dedicant Chane Kaplein and son denying request furnished substitute return with feeble minded child.

Learned. 3.40 P.

[fol. 59] (Copy. RA.)

U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926. Appeal

July 30, 1914.

Commissioner-General of Immigration, Washington, D. C.:

See correspondence in reference to Avrum Kaplein, which I think bears your No. 53798/292. A reference to the record will show that the boy, whose admission has occurred pursuant to your decision, was accompanied by his mother, a five year old brother and furteen years old sister, the latter being feebleminded. In my letter forwarding the boy's appeal I expressed the opinion that request would probably be made to furnish a substitute in lieu of the mother, and stated why I thought such a request should be denied. A formal request has now been submitted and is forwarded herewith, since it is addressed to the Honorable Secretary. I renew my recommendation that it be denied, as the afflicted daughter peculiarly requires a mother's care, and the father does not seem to be in a position to [fol. 60] provide adequately for his family if they were admitted and from his testimony must incur indebtedness to secure an attendant.

As previously stated the "Czar" is advertisied to sail on the 4th proximo, and I trust that decision upon this request may be received prior to that time.

(Signed) Byron H. Uhl, Acting Commissioner. U/KMC.

Encl. 32866.

[fol. 61] (Copy. RA.)

U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926. Appeal. L. P. C.

July 25, 1914.

Commissioner-General of Immigration, Washington, D.C.:

I forward herewith appeal of Avrum Kaplein, 16, native of Russia, ex SS "Kursk", July 20, 1914.

This appeal is for a 16 year old Russian Hebrew boy who wishes to go to his father. His mother, a 5 year old brother and a 14 year old sister came with him. The girl has been certified to be feebleminded and no appeal has been filed for the mother and other child, yet at the personal interview the woman said that she wished to

remain here with her two well children and send the feebleminded daughter back alone. Obviously, this cannot be permitted. Aside from the fact that the afflicted female child peculiarly requires a mother's care, the husband and father is in very poor circum- [fol. 62] stances—in fact has nothing saved at the present time and claims to have spent all his savings to bring his family here and furnish a home. The 16 year old boy presents a reasonably good appearance, and possibly he should be permitted to join his father. It is probable that a request will ultimately be made to furnish a substitute for the mother, although I do not see how this could be accomplished in view of the fact that the father says he has no money and, therefore, is not in a position to secure a substitute.

The SS. "Czar" will sail at 2 p. m. on August 4.

(Signed) Byron H. Uhl, Acting Commissioner. U/GCK.

Encl. No. 26038.

[fol. 63] (Copy. RA.)

Department of Labor, Office of the Solicitor, Washington

August 21, 1920.

Memorandum for the Acting Secretary in re Josef Bisping

In my judgment your action of August 13th in ordering an issuance of warrant of arrest for this alien was correct. The sole question is whether or not the five year period of limitation in Section 19 of the Immigration Act of 1917 comes into play where the alien has been admitted temporarily. This question came before this office and the 3rd instant, in the case of Sosie Zelkowski, (53798/346) and in memorandum to Mr. Reid it was said that in the judgment of this office "the five year period of limitation in Section 19 of the Immigration Act of 1917, is not applicable in this case. The custody of the Department has never been relinquished with respect to the alien except in so far as the Government has allowed her temporary admission for the purpose of receiving special care and attention in an institution adapted to the treatment of her disability. She can not be said to have 'entered' the United States in the sense that that term is used in the deportation section, and it would be impossible therefore to fix the point of time from which the statute of limitations would begin to run." If you agree with this view it will be necessary only to re-issue instructions of August 13th. (See memorandum at marker.)

(Signed) H. B. Collins, Acting Solicitor. HBC:SMB.

Approved: R. B. Mahany, Asst. Secretary.

Endorsed: U. S. Dist. Court, S. D. of N. Y. Filed Oct. 4, 1923.

[fol. 64] Department of Labor

Gen. No. 16. 53798/292. Inc. 303.

Washington, D. C., April 28, 1923.

I hereby certify that the annexed is the original file constituting the record of the Bureau of Immigration, Washington, D. C., in the case of Esther Kaplein.

W. W. Sibray, Assistant Commissioner-General of Immigration.

Office of the Secretary

I hereby certify that W. W. Sibray, who signed the foregoing certificate, is now, and was at the time of signing, Assistant Commissioner-General of Immigration, and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name and caused the seal of the Department of Labor to be affixed this 28th day of April, one thousand nine hundred and twenty-three.

Robe Carl White, Second Assistant Secretary of Labor. (Seal.)

[fol. 65] Western Union Telegram

Mar. 20, 1923, 8 p. m.

NC848 67 2 Extra NL.
W New York NY 20.

Hon. E. U. Henning, Asst. Secretary of Labor, Washington, D. C.:

In re deportation Esther Kaplan Act March Second Nineteen Seven Inapplicable stop see United States against Todd Two Eighty Five Federal five twenty three second circuit where similar situation arose stop Will appreciate your extending date of deportation to April fifteenth to enable me to prepare petition for writ of habeas corpus stop Hope you will reconsider in view of above decision stop Kindly wire me.

E. N. Zoline, Woolworth Bldg.

[fol. 66] Commercial Rate. Collect.

No. 53798/292

March 20, 1923.

Ans. 168 W Lx 113, New York, N. Y.

Elijah N. Zoline, Woolworth Bldg., New York, N. Y.:

Deportation Esther Kaplein stayed until April first. As girl mentally defective she cannot "reside permanently in the United States", as required under section five Act March second nineteen hundred

and seven, in order to acquire citizenship through father's naturalization. Boyd versus Nebraska inapplicable.

E. J. Henning, Assistant Secretary. JF.

Furnished the Commissioner of Immigration, Ellis Island, N. Y. H., for his information, reference being made to his file No. 98626/926.

For the Special Immigrant Inspector.

JF.

[fol. 67] WESTERN UNION TELEGRAM

Received at ——.

168W Lx 113 Blue 6 Extra.

W. New York, N. Y., 10.36 A. Mar. 16, 1923.

Secy. of Labor, Washington, D. C.:

Esther Kaplan whom you ordered deported on April first nineteen twenty three is a citizen of United States through naturalization of her father who became citizen December fourteenth nineteen twenty stop She arrived in this country at the age of thirteen and has continued resided here with her parents stop Her status is defined by Section twenty one seventy two of revised statutes of United States as construed in Boyd against Nebraska one forty three United States one thirty five stop To avoid any misapprehension in this matter I will ask you to kindly grant a rehearing and postpone date of deportation stop An early reply will be appreciated.

Elijah N. Zoline, Attorney for Esther Kaplan, Woolworth Bldg. 2.26 p.

[fol. 68] 53798/292

February 17, 1923.

Commissioner of Immigration, Ellis Island, N. Y. H.:

There is transmitted herewith Ukrainian passport for the alien Esther Kaplein, (your No. 98626/926) which has just been received from the Ukrainian Diplomatic Mission, this city. It is assumed that the alien can now be deported with little further delay.

Assistant Commissioner-General. (Signed W. W. Sibray.)

B.

Inc. 9493.

[fol. 69] Ukrainian Mission, Washington, D. C.,

2507 Brentwood Road, February 14, 1923.

U. S. Department of Labor, Bureau of Immigration, Division of Deportation, Washington, D. C.

GENTLEMEN: Please find enclosed passport for the alien deportee, Esther Kaplein (Kaplan), Bureau file No. 53798/292, $5.00.

Four (4) photographs of the deportee are herewith returned.

Very truly yours, Jno. Jardan, Consular Representative.

[fol. 70] Bureau File No. 53798/292.
Name: Ester Kaplein.
Sex: Female.
Age on arrival: 14.
Port of arrival: New York.
Date of arrival: July 20, 1914.
Country of origin: Russia.
Race or people: Hebrew.
Medical certificate: Feebleminded.
Period of temporary admission: One year.
Temporary admission extended to: Warrant of deportation issued Nov. 14, 1922.
Where and with whom living: Parents—249 Monroe Street, New York City.
Relatives abroad: Grandparents.
Remarks: Now pending before Department.

[fol. 71] 53798/292

February 13, 1923.

Ukrainian Diplomatic Mission, 2507 Brentwood Rd. N. E., Washington, D. C.

(Attention of Mr. John Ardan, Consular Representative)

Dear Sir: This Department has under order of deportation one Esther Kaplein, who is believed to be a native and subject of Ukrainia and for whom a passport is desired in order that her deportation may be effected as promptly as possible.

The charge against this woman in the warrant of deportation is: "That she was feeble-minded at the time of her entry."

For your further information, there are inclosed herewith six copies of the subject's photograph and copy of the record of hearing given her at the time of her arrest, with the request that you kindly issue the desired passport and transmit same to the Bureau when it is ready for delivery.

Very truly yours, W. W. Sibray, Assistant Commissioner General. RB:BS.

Incl. 5330.

Official copy furnished the Commissioner of Immigration, Ellis Island, N. Y. H., for his information, reference being made to his file No. 98626/926.

—— ——, Assistant Commissioner General. RB:BS.

[fol. 72] U. S. Department of Labor, Immigration Service.

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

Commissioner General of Immigration, Washington, D. C.:

I enclose herewith copy of record of hearing and six photographs, in the case of Esther Kaplein, Bureau file No. 53798/292, for use in securing a passport from the representative of Ukrainia at Washington.

H. R. Landis, Assistant Commissioner. (B. S. I. of Appeals.) RW/HF.

Ec. 42665.

[fol. 73] Ellis Island

January 10, 1923.

53798/292

In re Esther Kaplein, Aged About 21

The case comes before the Board of Review on warrant proceedings.

Secretary to Congressman Sullivan heard.

This alien was arrested on the ground that she was feeble-minded at the time of her entry.

The record relates to a young Ukranian Hebrew girl who last entered the United States at New York City on July 20, 1914. When the alien arrived she was certified to be feebleminded but owing to conditions abroad she was admitted temporarily. Subsequently, it became necessary to issue a warrant for her arrest. The charge in the warrant appears to be sustained and it is felt that deportation should be directed. However, in order to give her an opportunity to arrange her affairs before departure it is felt that deportation should be stayed for a reasonable period of time.

It is recommended that the alien be ordered deported to Ukrania at Government expense, but that deportation be stayed until April 1, 1923.

George W. Zope, Chairman Secy. & Com. Gen'l's Board of Review. ES/MLC.

So ordered: Robe Carl White, Second Assistant Secretary.

[fol. 74]

N. Y. Form 192

U. S. Department of Labor

Immigration Service

Gr. 39. 616/926

Before a Board of Special Inquiry Held at Ellis Island, New York Harbor, N. Y., This 22d Day of July, 1914—3.25 p. m.

S. I. 32

Names of Aliens: KAPLEIN, CHANA, Female, 45; AVRUM, male, 16; SCHMUEL, Male 5; ESTER, Female, 14

Present: Inspectors Harper (ch'man), Browne, & Raczkiewicz.
Sec. 11 & L. P. C. Insp.
S. S. "Kursk." RA. July 20, 1914.
Tedesco.
Interpreter: Stern.

Medical Certificate (Ester Kaplein): This is to certify that the above described person has this day been examined and is found to be feebleminded.

(S.) Chas. N. Vogel, D. C. R. Turnipseed, H. F. White (surgeons).

Aliens, sworn by Insp. Harper, testified:

I came with my children; born and lived in Neukosentien, where I leave my father Chaim Kleiner, and mother Buba; going to my husband Schaje Kaplein who paid for our passage, 242 Monroe St., New York City, and who has been in the U. S. 3 years; all of us read and write; housewife; no occupation for the children; never here before; shows $40.

By Insp. Harper (to eldest alein):

Q. Have you other relatives here?
A. A son by my first husband Beres Goldberg.
Q. These children you have here are by your present husband?
A. Yes.
Q. Your daughter has been certified as being feebleminded and under the law will be returned to Russia, you and your two children will be returned with her, have you any further statement to make?
A. No statement.

The Medical Division having certified that alien Ester Kaplein [fol. 75] as being feebleminded, she is excluded and ordered deported at the expense of the steamship company. The Medical Division having issued a certificate that this child is helpless from infancy and condition above stated, the eldest alien, the mother, is excluded under Section 11 as accompanying alien. In the opinion of the Board the children, Avrum 16 and Schmuel 5 are persons

likely to become a public charge for the following among other reasons:

By reason of the tender years of the younger alien, he will be incapable of self-support, and we believe should have the care and supervision of his mother; we have no assurance that the father who is in the U. S. is in any position to properly provide for them.

Aliens are excluded and ordered deported.

(To aliens, Chana, Avrum & Schmuel Kaplein:) Under the law you are entitled to appeal from the decision of the Board denying you the right to land, to the Secretary of Labor at Washington for a review by him of such decision. You will be returned at the expense of the steamship company which brought you.

Q. Do you understand your rights?
A. Yes.

G. A. Larkin, Sec.

(By dictation from Sec'y Greiner to Sec'y Larkin.)

CERTIFICATE

(Section 11, Immigration Laws, 1907)

July 22, 1914.

Ester Kaplein age 14 years, native of Russia, arrived July 20, 1914, per S. S. "Kursk" Certified July 22, 1914—feebleminded.

The above named alien, rejected by the Board of Special Inquiry, is, in my opinion, helpless from infancy and condition above stated for the purposes contemplated by Section 11.

(S.) Harry F. White, Asst. Suregon, P. H. Service.

[fol. 76]

N. Y. Form 192

U. S. Department of Labor

Immigration Service

Lloyd-39

Before a Board of Special Inquiry Held at Ellis Island, New York Harbor, N. Y., July 23, 1914—11.42

S. I. 32

Names of Aliens: KAPLIN, CHOMA, and 3 Ch. Russ-Hebrew

Present: Inspectors Harper (Chairman), Raczkiewicz, and O'Connor.

Exs. GR. 39 7-22. S. S. Kursk, July 20, 1914. Inspector Tedesco.

Rehearing by B. H. Uhl, 7-23.

Stern, Interpreter.

Witness called, sworn and examined by Inspector Harper, testified:

SCHAJE KAPLIN, 242 Monroe Street, New York City. I call for my wife and 3 children (names aliens).

Q. How long have you been here?

A. 3 years.

Q. Declared your intention to become a citizen?

A. No.

Q. What is your business?

A. Clothing presser and earn $17 to $18 a week.

Q. Any money saved?

A. No, I spent all my savings to get my family here and furnish a home.

Q. Did you know your daughter was weak minded before you sent for them to come here?

A. No.

The testimony of the witness does not change the status of the case. Former decision sustained for reasons given at the previous hearing.

Mr. Harper: You and your sons are entitled under the law to an appeal from the decision of this Board, denying you all the right to land, to the Secretary of Labor in Washington, for review by him of such decision. You will be returned at the expense of the steamship [fol. 77] company which brought you here. Your daughter has no right of appeal. Do you understand your rights?

A. Yes.

Alien excluded and ordered deported.

R. S. Lloyd, Secretary.

[fol. 78] MEDICAL CERTIFICATE.

HVW/ee.

Ellis Island, N. Y., February 23, 1922.

Alien Esther Kaplein, age 21, ex S. S. "Kursk," July 20, 1914. We have examined the above named alien today and find that she is feebleminded. Attention is directed to a statement in behalf of alien made by Samuel Littman, representative of the Hebrew Sheltering and Immigrant Aid Society of America, dated May 8, 1915—"—She is of such low grade of feeblemindedness that she is absolutely dependent on others as far as her personal care is concerned—" The certificate of July 21, 1914, is hereby confirmed.

H. V. Wildman, Jr., F. A. Surgeon. T. S. Love, Asst. Surgeon. R. C. Faughnan, A. A. Surgeon.

Respectfully referred to the Commissioner of Immigration re 98626/926.

G. M. Corput, Acting Chief Medical Officer.

[fol. 79] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

November 2, 1922.

Commissioner-General of Immigration, Washington, D. C.:

The alien Esther Kaplein was apprehended September 27, 1922 on Department Warrant of Arrest No. 53798/292, dated March 17, 1922, and pursuant to instructions contained therein was granted a preliminary hearing at Ellis Island.

In default of bail she was detained until this date when bond was furnished in her behalf. I forward herewith for the Bureau's approval, original instrument executed by Nathan Lacher and Morris Bogad, real estate having been accepted by this office, conditioned for the delivery of the above-named alien.

H. R. Landis, Assistant Commissioner, in Charge B. S. I. and Appeals. CHW.

Encl. No. 12705.

[fol. 80] U. S. Department of Labor, Bureau of Immigration

—— —, 19—.

Respectfully referred, by direction of the Secretary, to the Solicitor for the U. S. Department of Labor for examination as to form and execution.

I. S. Dixon, Acting Commissioner General.

(Stamp:) Solicitor, Nov. 13, 1922.

Department of Justice, Office of the Solicitor for the U. S. Department of Labor

1—28065

Nov. 14, 1922.

Examined and approved as to form and execution.

H. B. Collins, Acting Solicitor.

U. S. Department of Labor, Office of the Secretary

Nov. 14, 1922.

Approved: Robe Carl White, Second Assistant Secretary.

[fol. 81] BOND CONDITIONED FOR THE DELIVERY OF AN ALIEN

Original

The following rules must be carefully observed and complied with:

* * * * * * *

No. 98626/926. No. 53798/292

Know all men by these presents:

That we, Nathan Lacher, residing at 276 Monroe Street, New York City, and Morris Bogad, 295 Henry Street, New York City, are held and firmly bound unto the United States of America, in the full and just sum of One Thousand dollars, ($1,000) to be paid to the United States, for which payment well and truly to be made, we, and each of us, do bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of November, 1922.

Whereas Esther Kaplein, an alien, aged 21 years, a native of Russia, Hebrew Race, who arrived at the port of New York, New York, per S. S. "Kursk," on the 20th day of July, 1914, has, under the provisions of section 19 of the immigration act of February 5, 1917, been placed under arrest on warrant of the Secretary of Labor, issued on the 17th day of March, 1922, on the charge that she is unlawfully within the United States:

[fol. 82] And whereas, pending the final disposal of her case the said alien desires to avail herself of the privilege of being released from custody accorded by section 20 of the said Act of Congress, and has applied to the immigration official by whom said warrant has been served for her release upon giving a proper bond or undertaking that she will deliver herself into the custody of the said immigration official or other proper immigration official representing the United States Government for hearing or hearings and for deportation in case she is found to be unlawfully within the United States:

Now, therefore, the condition of this obligation is such that if the above-bounden obligors, or either of them, shall, in case said alien is released from custody, cause the said alien to be delivered over to the said immigration official or other proper immigration official representing the United States Government for hearing or hearings in regard to the charge upon which, as above set forth she has been taken into custody, and if, in case the said alien, upon such hearing or hearings, is found to be unlawfully within the United States, and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, they or either of them shall at any time upon request [fols. 83 & 84] cause the said alien to be delivered into the custody of the said immigration official for deportation under the aforesaid warrant, delivery either for hearing or hearings or for deportation to be

made upon request of the proper immigration official, and to be complete only upon acceptance of said alien by said immigration official, then this obligation to be void; otherwise to remain in full force and virtue.

Nathan Lacher (Seal), 276 Monroe St., N. Y. C. Morris Bogad (Seal), 295 Henry St., N. Y. C.

Signed and sealed in the presence of C. H. Williams, Ellis Island, N. Y. H.; F. J. Bock, Ellis Island, N. Y. H.; C. H. Williams, Ellis Island, N. Y. H.; F. J. Bock, Ellis Island, N. Y. H.

Oaths of signers of bond omitted.

[fols. 85 & 86] Certificate of solvency omitted.

[fol. 87] March 11, 1922.

53798/292

In re Esther Kaplein

This case comes before the Board of Review for consideration of an extension.

Secretary to Congressman Perlman heard.

This is the case of a feeble minded girl who was admitted in July, 1914, and in whose case a recent certificate has been rendered to the effect that she is still feeble minded. In view of these circumstances it is believed that a warrant of arrest should issue looking to the alien's deportation. Congressman Perlman's secretary requests that no action be taken in this case until next Tuesday, March 14th, when the Congressman would be in town and would be in a position to take the case up personally with the Department, however she was advised that no action would be taken looking to a withdrawal of the recommendation that the warrant issue inasmuch as the alien's deportation could not possibly occur prior to the time Congressman Perlman may have an opportunity to appear before the Department.

It is recommended that a warrant issue for this alien on the ground that she was feeble minded at the time of entry.

Robe Carl White, Chairman Board of Review.

So Ordered: Theodore G. Risley, Acting Secretary.

[fol. 88] Department of Labor, Office of the Assistant Secretary, Washington 3/7/22.

#53798-292

Re Esther Kaplan

This girl was admitted in July, 1914. Why is she being ordered deported at this time?

Please have deportation stayed until Congressman Perlman can call personally, which will be Tuesday, March 14th.

F. E. Becker, Sec'y.

[fol. 89] March 4, 1922.

53798/292, Ellis Island

In re ESTHER KAPLEIN

SUPPLEMENTAL MEMORANDUM

When this Russian Hebrew girl arrived in July, 1914, she was 14 years of age and was excluded on a certificate for feeblemindedness. The Department directed the admission of a brother. Her mother was excluded as an accompanying alien and another brother (aged 5) as LPC. The Department ultimately directed the temporary admission of the mother and younger brother under bond in the sum of $1,000 to depart when the deportation of the feebleminded girl could be effected. Individual bond was furnished. Esther was left in detention and Nov. 15, 1914, instructions were given to admit her under bond. This was not done and on April 22, 1915, a further instruction was given that she could not land—"No action." May 19, 1915, the port was instructed to deport the mother, brother and Esther. May 21, 1915, stay of deportation was directed. June 11, 1915, the Department gave a qualified instruction for placing the girl in custody of the H. S. I. S., with consent of the Society. She was delivered to the care of that Society June 18, 1915. She is now 21 years of age, has been reexamined by a full board of medical officers and again certified to be feebleminded. Her father became a citizen Dec. 14, 1920. It follows that the mother of the girl is an American citizen, and the mother's departure cannot be insisted upon and a suit to recover the penalty in the bond for failure to depart would not succeed. Departure of the boy might be insisted upon as citizenship has not passed to him, but as he is but 12 years of age, he would be of no service in the matter of deportation. The girl is of course still an alien. The Solicitor's Office has expressed the opinion that in a temporary landing of this nature the five-year limit under Sec. 19 does not apply. It is not to be expected that departure of Esther will be voluntary and the steamship company's responsibility for the expense of deportation has expired.

With a view to finally disposing of the case, the Bureau has to recommend that warrant for the arrest of the alien be issued on the [fol. 90] ground that she was feebleminded at the time of entry.

I. F. Dixon, Asst. Commissioner General. FJP.
March —, 1922.

Considered and recommended that warrant of arrest issue for this alien on the ground that she was feebleminded at the time of entry.

Rober Carl White, Chairman, Board of Review. GWB/MLC.
So Ordered.

[fol. 91] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor

No. 98626/926

Commissioner General of Immigration, Washington, D. C.:

In re Esther Kaplein, ex S. S. "Kursk," July 20, 1914. Certified to be feebleminded, but paroled by direction of the Department to the custody of the Hebrew Sheltering and Immigrant Aid Society. Bureau No. 53798/292.

Alien was brought to Ellis Island on the 23rd instant and was certified again to be feebleminded. She resides with her parents at 249 Monroe Street, New York City, and the father has secured naturalization papers, copy of which is attached. Further instructions are requested.

H. R. Landis, Asst. Commissioner, in Charge B. S. I. and Appeals. EL.

Inclosure 17229.

[fol. 92] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

No. 1,432,278

THE UNITED STATES OF AMERICA:

CERTIFICATE OF NATURALIZATION

Petition, Volume 461. Number 111,876.

Description of holder: Age, 52 years; height, 5 feet 9 inches; color, white; complexion, dark; color of eyes, gray; color of hair, brown; visible distinguishing marks, none.

Name, age and place of residence of wife: Anna, 48 years; 249 Monroe Street.

Names, ages and places of residence of minor children: Esther, 19 years, and Samuel, 11 years, 249 Monroe Street.

Sam Kaplan.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that Sam Kaplan then residing at number 249 Monroe Street, City of New York, State of New York, who previous to his naturalization was a subject of Russia, having applied to be admitted a citizen of the United States of America pursuant to law, and at a special term of the Supreme Court of the State of New

York held at New York on the 14th day of December in the year of our Lord nineteen hundred and twenty, the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for at least one year immediately preceding the date of the filing of his petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that he was entitled to be so admitted, it was hereupon ordered by the said court that he be admitted as a citizen of the United States of America.

[fol. 93] In testimony whereof the seal of said court is hereunto affixed on the 14th day of December, in the year of our Lord nineteen hundred and twenty, and of our Independence the one hundred and forty-fifth.

(Sgd.) William Schneider, Clerk. (Sgd.) F. H. Muller, Special ——.

Department of Labor.

[fol. 94] January 5, 1918.

54171/631

Commissioner of Immigration, Ellis Island, N. Y. H.:

Acknowledging the receipt of your letter of November 7th last (No. 98526/194) forwarding a list of mentally defective alien women who have been temporarily admitted by the Department, you are directed to have an investigation made concerning the present situation of all of these aliens with the exception of those whom your records shows have been married. Where the alien is not resident in your jurisdiction it will, of course, be necessary for you to transmit the Bureau's instructions with sufficient information to the officer in charge of the appropriate district. It is directed that you detail Dr. Katherine Herring to make the investigations for your office.

The reports should be submitted in duplicate in the individual cases as fast as the investigations are completed.

Commissioner-General. CAS-SAA.

[fol. 95] U. S. Department of Labor, Bureau of Immigration, Washington

Name of Alien Concerned: Ester Kapland.
Port of Detention, S. S., etc.: Ellis Island (Old case).
(Stamp:) Received Bureau of Immigration June 22, 1915.
Parties interested: ——.
Date and Nature of Inquiry: 6/18/15. Name: Mr. Wolf. Action Requested: Ask admission under bond without institutional treatment (June 9, 1915).
6/24/15. File. Mr. Wolf advised. CAS.

[fol. 96] Report of Execution of Department Decision

U. S. Department of Labor, Immigration Service

Port of New York, June 18, 1915.

Commissioner-General of Immigration, Washington, D. C.

SIR: In accordance with Department decision No. 53798/292, of June 13, 1915, the alien Kaplein, Esther, was duly admitted in care of Hebrew Sheltering and Immigrant Aid Society.

Respectfully, (Name:) Byron H. Uhl, (Title:) Asst. Commissioner of Immigration.

(Stamp:) Rec'd Bureau of Immigration June 21, 1915.)

[fol. 97] WESTERN UNION TELEGRAM

A B 7 9 NY 24.
GD New York 11 338 P.

Louis G. Gottlieb, 945 Pennsylvania Ave. N. W., Washington, D. C.:

You may inform department that our society is willing to accept custody of Caplan girl until such time as deportation with safety is possible.

I. I. Lipsitch.

[fol. 98] U. S. Department of Labor Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

No. 98626/926

June 10, 1915.

Commissioner-General of Immigration, Washington, D. C.:

I forward herewith a communication addressed to the Honorable Secretary of Labor by the Ellis Island representative of the Hebrew Sheltering and Immigrant Aid Society relative to Esther Kaplein, who arrived on S. S. "Kursk", July 20, 1914, and was excluded as feebleminded. The case bears your No. 53798/292, and a reference to the file will indicate that unusual consideration was extended in permitting the mother and brother of this mentally defective alien to land, and that her temporary admission upon the filing of a bond, one requirement of which was to be institutional care was also directed. The interested persons have not filed such a bond and state they are unable to do so, but it is asserted that they can file the ordinary bond. A copy of a reply addressed to Mr. Littman when he made a similar request to this office is enclosed. The status of [fol. 99] the case is not changed in any particular. As you know, this office has a great deal of trouble in securing reports or compliance with the provisions of bonds filed in behalf of feebleminded aliens, and the State authorities have vigorously protested against even the

temporary admission of aliens so afflicted. This request, being addressed to the Secretary, is, of course forwarded, but I recommend that it be denied.

Byron H. Uhl, Assistant Commissioner. U/EMP.

Enclo. 10271.

[fol. 100] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

Samuel Littman, Esq., Representative Hebrew Sheltering and Immigrant Aid Society, Ellis Island.

SIR: I acknowledge receipt of your communication of the 8th instant, No. 31, in reference to Esther Kaplein, and note that her relatives are unable to furnish a bond one requirement being that she shall be placed in an institution adapted to the treatment of her disability, feeblemindedness. This child's condition is, as you state, so obvious that the institutional care seems to be an actual necessity for the protection of herself and the community. Actual experience in a number of cases where the required bond was filed has shown that those interested have made little or no effort to comply with this particular requirement, and that where it has been met, or an attempt made to meet it, considerable expense and trouble have resulted. I do not feel that the facts would justify my endorsing your request in this instance.

Respectfully, (Signed) Frederic C. Howe, Commissioner. U/EMP.

[fol. 101] Hebrew Sheltering and Immigrant Aid Society of America

Advisory Board: * * * Officers: * * *

Office of Samuel Littman, Respresentative U. S. Immigration Station, Ellis Island, N. Y.

In the Matter of Kapland, Ester. S. S. Kursk, 7/20/14. S. I. 32

June 9, 1915.

To the Honorable the Secretary of Labor, Washington, D. C., Thro' the Honorable Commissioner of Immigration, New York:

SIR: In the above entitled matter we respectfully apply for the temporary admission of the above named alien on a bond guaranteeing that she will return to her native country, Russia, when deportation thereto with safety and without hardship could be affected.

In the original application her landing was authorized upon such a bond being furnished with the additional clause that she will be placed in an institution for the treatment of her disability. Such a bond the relatives were unable to furnish. The mother and a five-year old brother were heretofore admitted on a bond guaranteeing their return with the feebleminded child when deportation with safety will be possible.

[fol. 102] This alien who is now about 15 years of age is now detained on Ellis Island for almost 11 months, and it must be admitted that during those 11 months of confinement on Ellis Island this girl must have certainly undergone great hardships, as any detention, no matter how much the effort may be made by the custodians of any detained person to make it as pleasant as possible, must be causing some hardships. To deport her at this time would also be a great hardship in view of the present European War conditions which must be very dangerous for women and children.

In view of the tender age of this alien, we do not believe it is dangerous to have her discharged in the custody of her parents until she can be deported with safety. She was for so many years in the custody and care of her parents without any physical harm having been done to her, and therefore it must be assumed that the parents would exercise the same caution while in their care in the United States as they did abroad. While they are unable to furnish bond with the institutional clause therein the relatives will have no hardship in furnishing a nordinary bond guaranteeing the departure of the girl when it will be possible with ordinary safety.

We have heretofore communicated with the Commissioner at this Station asking him to recommend an application as herein made, [fol. 103] but in view of the particular helplessness of this alien, he thought it dangerous to follow the course we suggested. We believe that just by reason of the particular helplessness of this alien, it would be safer to discharge her in the custody of her parents because of the fact that the parents are aware of her dependency on them, and therefore are particularly anxious to be careful as to her conduct and associations.

We therefore ask that this case again receive the consideration of the Department with a view of granting this application.

Respectfully, Samuel Littman, Representative.

[fol. 104] TELEGRAM

53854/39. May 21, 1915.

Immigration Service, Ellis Island, N. Y. H.:

By direction of Secretary detain until receipt of further instructions all aliens for whose deportation arrangements made by Russian American vessel sailing tomorrow.

Hampton.

For original carbon copy see 53845/39-H.

[fol. 105] Department of Commerce and Labor

MEMORANDUM

May 20, 1915.

Telegram received at the White House May 20, 1915, 12:00 P. M., from Leon Sanders, President, Hebrew Sheltering and Immigrant Aid Society of America protests against deportation of Russians via Archangel at this time. Some immigrants are going to be deported May 22, 1915, (Among them Chana Kaplan and children, file 53798/292 —) Vessel loaded with contraband—Requests that deportation of all aliens to Russia be postponed.

For original of above—see file 53,854/39.

[fol. 106] May 19, 1915.

53798/292

Immigration Service, Ellis Island, N. Y.:

Chana Kaplein and children mentioned your letter yesterday may now be deported in accordance with original decision and bond submitted their behalf.

Attest: Post, Assistant Secretary. WJP/LEG.

Exact copy as signed by Louis F. Post mailed May 19, 1915.

[fol. 107] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

May 18, 1915.

Commissioner-General of Immigration, Washington, D. C.:

See correspondence bearing your No. 53798/292, relative to Chana Kaplein and children Schmuel and Esther, who arrived on S. S. "Kursk", July 20, 1914. The girl Esther was certified to be feebleminded, and she, the mother and accompanying brother were ordered deported. Subsequently, on account of the war conditions, the mother and brother were landed temporarily upon bond requiring their departure "when said daughter Esther's deportation can be effected". Deportation can be effected by the Russian-American Line, which brought these aliens here. The next sailing thereof is advertised for May 22, and I purpose calling upon the bondsmen to produce the two aliens temporarily admitted for return with the afflicted child on that date, unless you direct to the contrary. Please let me have your decision as to this as quickly as possible, so that ample notice may be given those concerned.

Byron H. Uhl, Asst. Commissioner. U/EMP.

[fol. 108] Noted Apl. 22/15. Feebleminded can't land. No action. J. B. S. Russ.

[fol. 109] Department of Labor

11/15/14.

Mr. Densum:

These cases require special attention. F. M.

Special attention. Admitted under bond to depart when directed. D. D.

[fol. 110] List of Cases in Which Bonds Have Been Authorized But Where Relatives or Interested Persons Have Not Furnished the Same

Name of alien	Steamer	Bureau No.	Office No.
*Antoni Szczerbak	N. Amsterdam, 8/18	53798/635	98628/647
*Lafrenz Schumacher	Pres. Grant, 7/23	53798/732	98628/604
*Jewdokim Kulakowski	Celtic, 8/15	53798/746	98628/605
*Anton Kreibich	Barbarossa, 7/29	53798/601	98628/651
Ferenz Kobza	Berlin, 7/14	53798/283	98626/598
Dimitro Karapinka	Vaterland, 7/30	53798/431	98628/253
Janos Janess	K. Wm. der Gr., 7/16	53798/262	98626/778
Matyas Csepala	Krpr. Cecilie, 7/22	53798/582	98628/470
*Mijo Cogic	M. Washington, 8/3	53798/574	98628/649
Gabriel Bravata	Ryndam, 6/17	53798/670	98628/306
Esther Kaplein (Feeble)	Kursk, 7/20	53798/292	98626/926

Note.—In all cases marked with an asterisk the Department has directed that the alien be detained at Ellis Island until deportation can safely be effected.

For letter transmitting above list, see 53798/412.

[fol. 111] U. S. Department of Labor, Bureau of Immigration

October 19, 1914.

Respectfully referred, by direction of the Secretary, to the Solicitor of the U. S. Department of Labor for examination as to form and execution.

F. H. Jarnid, Asst. Commissioner General.

Department of Justice

Office of Solicitor of the U. S. Department of Labor

Oct. 20, 1914.

Examined and approved as to form and execution.

Charles I. Simms, Acting Solicitor.

(Stamp: Solicitor Oct. 20, 1914. 1-2822.)

U. S. Department of Labor

Office of the Secretary

Oct. 20, 1914.

Approved:

J. W. Dunsume, Acting Secretary.

[fol. 112] U. S. Department of Labor, Immigration Service

BOND THAT AN ALIEN SHALL NOT BECOME A PUBLIC CHARGE, ETC.

The following rules must be particularly observed and complied with:

* * * * * * *

98626/926

Know all men by these presents:

That we, David Streicher, residing at 20 Scholes Street, Borough of Brooklyn, City of New York, and Aron Streicher, residing at 306 Hart Street, Borough of Brooklyn, City of New York are held and firmly bound unto the people of the United States of America, and of every State, Territory, county, municipality, or district thereof, in the full and just sum of One thousand dollars ($1,000) to be paid to the United States or any State, Territory, county, municipality or district thereof, for which payment well and truly to be made, we bind ourselves, or heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of October, 1914.

Whereas, Chana and Schmuel Kaplein, aliens, aged respectively 45 and 5 years, natives of Russia, who arrived at the port of New York, per SS. "Kursk," on the 20th day of July, 1914, have applied [fol. 113] to the Secretary of Labor for admission into the United States.

And whereas, the Secretary of Labor has, in his discretion, decided to admit the said aliens into the United States upon the giving of a suitable and proper bond or undertaking, containing the conditions hereinafter mentioned:

Now, therefore, the conditions of this obligation are such that (1) if the above bounden obligors shall, in case the said aliens or either of them, are admitted into the United States, save jointly and severally, well and truly, as long as the said aliens remain in the United States, save harmless the United States, and every State, Territory, county, municipality and district thereof, and every institution supported in while or in part by public funds (Federal, State, Territorial, county, or municipal) against said aliens or either of them becoming a public charge, and from any and all charges or expenses arising therefrom, whatsoever the cause may be and whether it arises prior to or subsequent to arrival in the United States; and (2) if the above-bounden obligors, or either of them, shall, within thirty days prior to the expiration of six months and one year, respectively, from the date hereof, make written reports to the Immigration Officer in charge at the Port of New York, showing as to said aliens, (a) residence and (b) occupation; and if said aliens shall depart from the [fols. 114 & 115] United States with the woman's feebleminded daughter Ester (now detained at Ellis Island) when the said daughter Ester's deportation can be effected, then this obligation to be void; otherwise to remain in full force and virtue.

David Streicher, Aron Streicher.

Signed and sealed in the presence of Henry Feldman, 677 Marcy Ave., Bklyn.; Matthew Feldman, 677 Marcy Ave., Bklyn.

Oaths of signers of bond omitted.
[fol. 116] Certificate of solvency omitted.

[fol. 117] Department of Labor

Gen. No. 16. 53798/292. Incl. 303

Washington, D. C., April 28, 1923.

I hereby certify that the annexed is the original file constituting the record of the Bureau of Immigration, Washington, D. C., in the case of Esther Kaplein,

W. W. Sibray, (Official title:) Assistant Commissioner-General of Immigration.

Office of the Secretary

I hereby certify that W. W. Sibray who signed the foregoing certificate, is now, and was at the time of signing, Assistant Commissioner-General of Immigration and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 28th day of April, one thousand nine hundred and twenty-three.

Robe Carl White, Second Assistant Secretary of Labor.
(Seal.) JF.

14—103.

[fol. 118] No. 53798/292

April 28, 1923.

Commissioner of Immigration, Ellis Island, N. Y. H.:

As requested in your telegram of the 27th instant, the Bureau transmits herewith its file in the case of Esther Kaplein, same having been certified under the seal of the Department.

Please return the record when it has served your purpose.

For the Commissioner-General, —— ——, Special Immigrant Inspector. JF.

Inc. 303 (Cert. File).

[fol. 119] 53798/297

April 10, 1923.

Commissioner of Immigration, Ellis Island, N. Y. H.:

Referring to your letter of March 30th, No. 98826/926, relative to Esther Kaplein or Kaplan, you are advised that the Second Assistant Secretary has carefully considered the evidence transmitted with your communication, and has directed that the outstanding instructions to effect her deportation be carried into effect.

For the Commissioner-General: O. W. Munster, Special Immigrant Inspector. JWB.

[fol. 120] 53798/297—Ellis Island

April 5, 1923.

In re Esther Kaplein, Aged About 21

This case comes before the Board of Review for consideration of brief filed by attorney.

Attorney Elijah N. Zoline interested. Congressman Sullivan formerly interested.

This is one of the feebleminded cases in which deportation was to take place after April 1. The girl is a native of Ukrania and arrived at Ellis Island accompanied by her mother and two brothers. She was destined to her father and was excluded by a Board of Spe-

cial Inquiry on July 23, 1914 on certificate for feeblemindedness. After making several different orders the Department ultimately instructed (June 11, 1915) that the girl be placed in the custody of the H. I. A. S., which was accomplished on June 18, 1915. Warrant was issued for her arrest on March 17, 1922. She was accorded a hearing and has been ordered deported. At the hearing she had an attorney but no brief was filed. A different attorney, Elijah N. Zoline, has been employed and has filed a brief. All the defense set up is that the girl became a citizen by reason of the naturalization of the father on December 14, 1920. The brief calls attention to Section 2172, R. S., and cites five cases, none of which would support the claim to acquired citizenship. Section 2172 reads as follows:

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered [fol. 121] as citizens thereof; but no persons heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed."

While Boyd vs. Thayer, 143, U. S. 135, alludes to said section, it will be recalled that the majority opinion of the court disposed of the case on the theory that Boyd, a native of Ireland, "was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission."

Zartarian vs. Billings, 204 U. S. 170, construed said section 2172. The little Armenian girl in that case was excluded at Boston for trachoma. At about the time of her arrival her father became a citizen by naturalization. The supreme Court held that she did not become a citizen of the United States by reason of the naturalization of her father.

In United States ex rel Sejnensky vs. Tod, 285 Fed. 523, it will be recalled that the Circuit Court of Appeals for the second Circuit held that a fee' leminded woman who marries an American citizen in this country while temporarily landed becomes a citizen of the United States.

Gonzales vs. Williams, 182 U. S. 1, held that a citizen of Porto Rico was not an alien and hence could not be excluded under the Immigration laws.

The attorney's arguments are predicated on an obsolete section contained in the Act of 1802. He has been informed of but ignores the 5th section of the Act of March 2, 1907, reading as follows:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child; And provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

[fol. 122] Since said Act of 1907 two reported cases have arisen in which the courts considered the section in question: In U. S. ex rel. De Rienzo vs. Rodgers, 185 Fed. 334 (3 C. C. A.), the court said,—

"Under the Act of March 2, 1907, citizenship is only conferred upon the minor child of a naturalized parent when (or if) he has begun to reside permanently in the United States. Until then, he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry into the country by the Act to regulate the immigration of aliens into the United States."

The De Rienzo case points to the ambiguity of "if dwelling in the United States" (predicated on minor children) of Section 2172, R. S., and the definiteness of the Act of 1907 that "the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." In re Camaras, 202 Fed. 1019, was a naturalization case arising in the District Court of Rhode Island. The question arose as to whether the naturalization of the father would naturalize a trachomatous daughter under detention at Boston, and the court pointed out that as she had not been admitted citizenship would not attach.

It will be noted in the instant case the Departmental order was,—

"If the Hebrew Sheltering and Immigrant Aid Society will stipulate to become custodian of the child until she can be safely deported, to return her when required, and meanwhile to prevent her becoming a public charge, they will be appointed such custodian."

It must be assumed then that the girl is in this country as a matter of fact but she is probably not as a matter of law. Her temporary landing arose under the Act of 1907, which did not contain a provision permitting the temporary admission of inadmissible aliens such as the 9th proviso of the 1917 Act. This is one of a number of cases where due to the exigencies of the war, on humanitarian grounds, it became necessary to release excluded aliens in the [fol. 123] custody of responsible parties. It might be pointed out that in the Boyd case the then Governor of Nebraska arrived in 1844 prior to any Immigration acts and there was of course no question of his right to remain here such as in the instant case.

It is noted that Attorney Zoline intends to try the case on habeas corpus, he having requested extension of the date of deportation in order to enable him to prepare petition for a writ of habeas corpus. A passport has been secured for the alien.

It is recommended that the port be instructed to proceed with deportation.

Edw. J. Shaughnessy, Actg. Chairman Secy. & Comr. Gen'l's Board of Review. FJP/MLC.

So ordered: Robe Carl White, Second Assistant Secretary.

[fol. 124] Address answer to "Commissioner of Immigration" and refer to number 98826/926.

U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

March 30, 1923.

Commissioner General of Immigration, Washington, D. C.:

Referring to Bureau file No. 53798/292, I beg to enclose, at the request of Congressman Samuel Dickstein, the brief of Elijah N. Zoline, in behalf of Esther Kaplan or Kaplein. Further instructions at the earliest possible moment are respectfully requested.

H. R. Landis, Assistant Commissioner, in Charge B. S. I. & Appeals. HRL:SO. Incl. 49643.

[fol. 125] In the Matter of the Deportation of ESTHER "KAPLEIN," Whose True Name is ESTHER KAPLAN

BRIEF IN BEHALF OF ESTHER KAPLAN ON THE QUESTION OF HER CITIZENSHIP

Elijah N. Zoline, of counsel for Esther Kaplan.

[fol. 126] The Facts.

Esther Kaplan was born on September 10, 1901 at New Konstantyn, Russia. On July 20, 1914, she landed in the United States at the Port of New York on the "S. S. Kursk," accompanied by her mother and two younger brothers. At the time of her arrival, it was thought by the immigration officials that she was feeble-minded, but she was permitted to enter upon condition that she furnish a bond for $1,000 for a period of one year. It appears that no effort to deport her was made until May 17, 1922, when a warrant for her deportation was issued by the Secretary of Labor. In the meantime, her father, Sam Kaplan, was admitted to citizenship of the United States on December 14, 1920 by the Supreme Court, First Judicial District, New York State, and a certificate of naturalization [fol. 127] was duly issued to him, bearing No. 1,432,278.

The important thing to remember is that at the time of the arrival of Esther Kaplan in the United States, she was but thirteen years of age, and that she has continuously resided in the United States with her parents.

Point I

All disabilities of Esther Kaplan of an alien character were removed by her becoming a citizen of the United States on December 14, 1920, through the naturalization of her father.

Section 2172 of the Revised *Statutes* of the United States provides:

"Sec. 2172 (Children of persons naturalized under certain laws to be citizens). The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and [fol. 128] the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no persons heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed. (R. S.) "Act of April 14, 1802, ch. 28, 2 Stat. L. 155."

In Boyd v. Nebraska Ex rel Thayer, 143 U. S. 135, the court, construing the statute above referred to, held that a minor child who dwells with his father in the United States at the time of his father's naturalization, becomes ipso facto a citizen of the United States.

In Zaratarian v. Billings, 204 U. S. 170, the court, construing Section 2172 of the Revised Statutes of the United States, adhered to the same principles as laid down in Boyd v. Nebraska Ex rel. Thayer, supra, but qualified it by holding that said Section 2172 applies only to children of naturalized parents under the age of 21, who, at the time of the naturalization of their parents, reside in the United States, and not to those who are dwelling abroad. [fol. 129] In the instant case, Esther Kaplan, at the time of the naturalization of her father, was actually residing in the United States with him.

In the very recent case of United States Ex rel. Sejnensky v. Tod, Commissioner of Immigration, 285 Fed. 523, decided by the United States Circuit Court of Appeals for the Second Circuit, on November 14, 1922, the relator, who was considered by the immigration authorities as a feebleminded person, like in the case at bar, was admitted into the United States under bond and, while she was under such constraint, she married a citizen of the United States. It was contended that she was controlled by the Immigration Act of February 5, 1917, excluding certain classes from the United States, and by reason of that, she was disqualified from acquiring American citizenship.

The United States Circuit Court of Appeals, however, on review of the statutes and the decisions relating to this subject, reached the conclusion that the immigration laws do not apply to one who, while under bond, becomes a citizen of the United States through the naturalization of the husband, and that feeble-mindedness is not a ground for excluding such a person from the benefits of citizenship. In the particular case, the court held that the relator was a citizen of the United States. The opinion is rather lengthy and [fol. 130] we do not undertake to make any particular quotation from said opinion, but respectfully refer to it.

It is, of course, fundamental that an absurd or an unjust construction of a statute is to be avoided.

> United States Ex rel. Gottlieb v. Commissioner of Immigration of Port of New York, 285 Fed. 295 (C. C. A. 2d Circuit).

In the instant case, Esther Kaplan arrived in the United States when she was but 13 years old. To send her back to Russia to a place where she has no relatives or friends, and no means of support, to separate her from her parents and present environment, would be a cruel monstrosity, and, as considered by the United States Circuit Court of Appeals for the Second Circuit in the two cases above referred to, the statutes should receive such a construction as would avoid such an inhuman and unjust result.

Point II

If it be true, as we contend, that Esther Kaplan is a citizen of the United States, and was such at the time the warrant of deportation was issued, the Secretary of Labor was without jurisdiction to order her deportation.

In Gonzales v. Williams, 192 U. S. 1, Gonzales was ordered deported. Inasmuch as Gonzales had been by an Act of Congress [fol. 131] created a citizen of the United States, the Court held that the Commissioner of Immigration had no jurisdiction over Gonzales to order her deportation.

In deciding the Gonzales case, the court said:

"If she (Gonzales) was not an alien immigrant, within the intent and meaning of the Act of Congress * * * the Commissioner had no power to detain or deport her; * * * and in the present case, as Gonzales did not come within the Act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary."

In re Nicola, 184 Fed. 322 (C. C. A. 2nd Circuit), it was held that, if the person ordered excluded be a citizen of the United States, the immigration acts do not apply.

And see also:

> United States Ex rel. Sejnensky v. Tod, 285 Fed. 523.

Conclusion

For the foregoing reasons, it is respectfully submitted that the warrant of deportation should be rescinded, and that Esther Kaplan be permanently discharged from any restraint by the immigration officials.

Respectfully submitted, Elijah N. Zoline, of Counsel for Esther Kaplan.

[fol. 132] No. 53798/292

March 22, 1923.

Official copy furnished the Commissioner of Immigration, Ellis Island, N. Y. H., for his information, reference being made to this file No. 98626/926.

For the Commissioner-General. —— ——, Special Immigrant Inspector. JF.

[fol. 133] 53798/292

March 22, 1923.

E. N. Zoline, Esq., Attorney at Law, Woolworth Building, New York, N. Y.

Dear Sir: In reply to your telegram of the 20th instant, you are advised that the case of United States ex rel. Sejnensky v. Tod, 285 Fed. 523, in the opinion of the Bureau, does not support your contention that Esther Kaplein is a citizen of the United States by virtue of the naturalization of her father. In that case the woman herself married an American citizen, prior to the Cable Act, and the Court held that, as a result of such marriage, she was a citizen of the United States.

The case of Esther Kaplein is governed by the Act of March 2, 1907. Section 5 thereof reads as follows:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent; provided, that such naturalization or resumption takes place during the minority of such child; and provided further that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

In the case cited by you there is no reference made therein that the status of a minor child of a naturalized citizen is not subject to the qualification that "such minor child shall begin to reside in the United States permanently as a condition to citizenship.

[fol. 134] As your client was feebleminded at the time of her entry and is in the United States unlawfully as a result of her failure to leave the country at the expiration of her temporary admission, it can not be said "that she is residing here permanently."

Very truly yours, W. W. Sibray, Assistant Commissioner General. JFJ.

[fol. 135] 53798/292, Ellis Island

September 26, 1914.

In re CHANE KAPLEIN, Aged 45, and Her 5-year-old Child

SECOND SUPPLEMENTAL MEMORANDA FOR THE ACTING SECRETARY

In connection with the memoranda below the markers attention is invited to the petition next hereunder in which it is requested that, in view of the fact that the husband and father of the aliens cannot furnish a bond for the feeble-minded child, the mother and five-year-old child be permitted to land under temporary bonds guaranteeing their departure when deportation of the feeble-minded child can be effected and that the said feeble-minded child be meantime detained at Ellis Island.

The request impresses the Bureau as reasonably, under the circumstances and it is accordingly recommended that the previous decision be amended and the admission of Chane Kaplein and her child Schmuel directed providing a joint and several bond of $1,000 be furnished for the two guaranteeing their departure with the feeble-minded child Esther when the latter's deportation can be effected.

A. Caminetti, Commissioner-General. LLS-s.

Advise Mr. Wolf.
Approved: J. W. D.

[fol. 136] Hebrew Sheltering and Immigrant Aid Society of America

Headquarters: 229-231 E. Broadway, New York

Officers: * * *. Advisory Board: * * *

Sept. 23, 1914.

Hon. Simon Wolf, Woodward Building, Washington, D. C.

DEAR MR. WOLF: In the case of Chane, Schmuel, and Ester Kaplan, the Department on August 25th, '14, ordered the release of the feebleminded Ester on a bond for $1,000 and the others on $500 bonds. The husband and father of these children is unable to secure such bonds on account of the provision that the feebleminded shall receive institutional treatment, and that therefore it looks as though the whole family will have to remain indefinitely at this Station. This is a great hardship on this family. Can you possibly secure the admission of the elder alien and the boy Schmuel on a bond guaranteeing their return with the feebleminded child when deportation will be possible, and in the meantime, the feebleminded child remain at this Station. The latter is 14 years of age, and can easily take care of herself. I think that the Department ought to, in justice to these aliens, who arrived here on July 20, 1914, on

the SS Kursk, make such amended decision. The father will have no difficulty in securing bonds for his wife and other child.

Very truly yours, Samuel Littman.

[fol. 137] Department of Labor

No. 53798/292

August 22, 1914.

In re CHANE KAPLEIN, Aged 45, and Her 5-year-old Child

SUPPLEMENTAL MEMORANDUM FOR THE ACTING SECRETARY

As you may note from the memorandum below the markers, this case has been before the Department on two previous occasions, upon the first of which admission of a sixteen year old boy who came with the aliens was directed and on the second of which an application made for the substitution of a suitable attendant to return in place of the mother with the feeble minded girl was denied. The aliens are still at Ellis Island and the time of their deportation is problematical. To avoid the hardships incident to prolonged detention, therefore, the Bureau recommends that temporary admission be authorized under bond for each, guaranteeing that they will not become public charges and they will leave this country at the expiration of one year or sooner if directed without expense to the Government, and in the case of the "feeble-minded" child, that she will be confined meantime in an institution adapted to the treatment of her disability, the bond in her case being in the sum of $1,000.

F. H. Garnid, Acting Commissioner-General. LLS/HJW.

Advise Mr. Wolf.
Approved: L. J. P.

[fol. 138] Department of Labor

53798/292

August 3, 1914.

In re CHANE KAPLEIN, Aged 45, and Her 5-year-old Child

MEMORANDUM FOR THE ACTING SECRETARY

After careful consideration of all the facts in the above-named case, record in which is attached hereto, the Bureau concurs in the recommendation of Acting Commissioner Uhl that the request for substitution of an attendant in lieu of the elder appellant be denied and the deportation, of both aliens directed.

F. H. Garnid, Acting Commissioner-General. LHS:s.

Sailing tomorrow. Advise Mr. Wolf.
Approved: J. W. D.

[fol. 139] Department of Labor

53798/292

August 3, 1914.

In re CHANE KAPLEIN, Aged 45, and Her 5-year-old Child

DIGEST OF EVIDENCE

The appeal of a 16-year-old member of this family was before the Department on the 28th instant, as you may note from the memorandum below the marker. That member of the family was admitted. It was anticipated at that time that an application would be made for permission to furnish a substitute to return with the feeble-minded 14-year-old child and the application is now before us. As indicated in the digest of evidence in the previous case, the Bureau is of the opinion that the mother should return with her 14-year-old feeble-minded daughter and that the latter should not be placed in the care of a disinterested attendant. This is especially true in view of the present disturbed conditions in Europe.

LLS-s.

[fol. 140] U. S. Department of Labor, Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

98626/926

July 30, 1914.

Commissioner-General of Immigration, Washington, D. C.:

See correspondence in reference to Avrum Kaplein, which I think bears your No. 53798/292. A reference to the record will show that the boy, whose admission has occurred pursuant to your decision, was accompanied by his mother, a five year old brother and fourteen years' old sister, the latter being feebleminded. In my letter forwarding the boy's appeal I expressed the opinion that request would probably be made to furnish a substitute in lieu of the mother, and stated why I thought such a request should be denied. A formal request has not been submitted and is forwarded herewith, since it is addressed to the Honorable Secretary. I renew my recommendation that it be denied, as the afflicted daughter peculiarly requires a mother's care, and the father does not seem to be in a position to provide adequately for his family if they were admitted, and from his testimony must incur indebtedness to secure an attendant.

As previously stated, the "Czar" is advertised to sail on the 4th proximo, and I trust that decision upon this request may be received prior to that time.

Byron H. Uhl, Acting Commissioner. U/KMC.

Encl. 32866.

[fol. 141] 626/926

To the Secretary of Labor, thro' the Acting Commissioner of Immigration, Ellis Island, N. Y. H.

SIR: I make this appeal for the purpose of asking the release of my wife Chane Kaplan, and my son Schmuel Kaplan, upon my furnishing a suitable substitute to take back my daughter Ester who has been certified as a Feebleminded Person. My family arrived together with my boy Abrum on the S. S. Kursk July 20th, 1914, and were all excluded on account of the certified condition of Ester. Not having the means to pay for a substitute I only made an appeal for my son Avrum intending to have my wife and 2 children return, and when my financial condition would permit it, I should again send for my wife and my son Schmuel, leaving the feebleminded daughter at home. Since the making of my appeal I found a woman who comes from the same neighborhood as my family and who is about to return abroad. She is ready and willing to start out immediately and accompany my afflicted daughter to her home town and safely deliver her to my father in law, her grandfather. She is willing to engage passage on the next sailing of the Russian-American line. If this application is granted to me I [fol. 142] shall save myself the expense of again paying for transportation to bring back the rest of my family and also the trouble and inconvenience of two more trips which my wife and other minor child would be forced to undergo.

Trusting that your honorable department will grant this application, I am,

Respectfully, (Signature of alien:) Sam Kaplan, 242 Monroe Street, New York City.

[fol. 143] Department of Commerce and Labor, Immigration Service

REPORT OF EXECUTION OF DEPARTMENT DECISION

Port of New York, July 29, 1914.

Commissioner-General of Immigration, Washington, D. C.

SIR: In accordance with Department decision No. 53798/288-292 of July 28, 1914, the alien Kaplein, Avrum, was duly admitted July 29, 1914.

Respectfully, Byron H. Uhl, Acting Commissioner.

[fol. 144] 53798/288-292

July 28, 1914.

Immigration Service, Ellis Island, N. Y.:

Lauder Basilio Silvestri and Avrum Kaplien.

Larned.

Attest: —— ——. CTH.

[fol. 145] Department of Labor

No. 53798/292

July 28, 1914.

In re AVRUM KAPLEIN, Aged 16

MEMORANDUM FOR THE ACTING SECRETARY

After careful consideration of all the facts in the above-named case, record in which is attached hereto, the Bureau recommends that the appeal be sustained and admission directed.

F. H. Garnid, Acting Commissioner-General. LLS-s.

Sailing August 4. Advise Mr. Wolf.

Approved: J. W. D.

[fol. 146] Department of Labor

In re AVRUM KAPLEIN, Aged 16

DIGEST OF EVIDENCE

This 16-year-old boy arrived with his mother, a 14-year-old sister, and a 5-year-old brother. The sister is certified to be feeble minded, the mother has been excluded as an accompanying alien, and the brother as a person likely to become a public charge. They were all destined to the husband and father of the family, in New York, who paid their passages. His situation is not good, but this boy will probably be able to assist materially in his own support. The Bureau believes he may be safely admitted, but it is apparent from the statement of the case that the other members should go back.

LLS-s.

[fol. 147] Hebrew Sheltering and Immigrant Aid Society

Advisory Board: * * * Officers: * * *

S. I. 32

In the Matter of KAPLAN, AVRUM. Arrived on SS. Kursk 7/20/14

NOTICE OF APPEAL

To the Honorable Secretary of Labor, Washington, D. C., thro' the Honorable Commissioner of Immigration, Ellis Island, N. Y. H.

SIR: The alien above named, excluded from admission into the United States by a Board of Special Inquiry at Ellis Island, respectfully gives notice of appeal from the decision of the said Board, and begs leave to submit further papers.

Respectfully, I. Irving Lipsitch, Representative. (Signature of alien:) —— ——.

[fol. 148] HEBREW SHELTERING AND IMMIGRANT AID SOCIETY

Advisory Board: * * * Officers: * * *

Office of I. Irving Lipsitch, U. S. Immigration Station, Ellis Island, N. Y. H.

July 25, 1914.

To the Honorable the Secretary of Labor, Washington, D. C., thro' the Honorable Commissioner of Immigration, N. Y.

SIR: We respectfully submit the following facts in support of the appeal of the alien above named, notice of which has been filed.

This boy, aged 16, was excluded as "likely to become a public charge". He arrived with his mother, who, by reason of accompanying another child who is "feeble-minded", was ordered deported under Section 11. The father is in the United States, and he testified that he is steadily employed and earns $17 and $18 weekly, [fol. 149 & 150] and therefore we believe that he is able to give the boy the assistance which he will need to become self-supporting.

The boy is over 16 years of age, and therefore he can work to support himself. His earnings here will help materially in the support of the family on the other side, and will enable the mother to make disposition of the feeble-minded child on the other side, so that eventually she may return here and make her home with her husband.

We urge the admission of the boy only, as he can, in our opinion, take care of himself.

Respectfully, I. Irving Lipsitch, Representative.

Endorsed: U. S. Dist. Court, S. D. of N. Y. Filed Oct. 4, 1923.

[fol. 151] REPORT OF EXECUTION OF DEPARTMENT DECISION

U. S. Department of Labor Immigration Service

Port of New York, Oct. 7, 1914.

Commissioner-General of Immigration, Washington, D. C.

SIR: In accordance with Department decision No. 53798/292 of Sept. 28, 1914, the aliens Kaplein, China and Schmuel, were duly admitted temporarily on bond, Oct. 7, 1914.

Respectfully, Frederic C. Howe, Commissioner of Immigration.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, December 13, 1923.

William Hayward, U. S. Atty., Attorney for Respondent.
Elijah N. Zoline, Attorney for Petitioner-Appellant.

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 13th day of December in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

Endorsed on cover: File No. 30,008. S. New York D. C. U. S. Term No. 241. Esther Kaplan, appellant, vs. Robert E. Tod, Commissioner of Immigration, Ellis Island, Port of New York. Filed December 14th, 1923. File No. 30,008.

(9)

Office Supreme Court, U. S.
FILED
JAN 22 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 241.

ESTHER KAPLAN,

Appellant,

against

ROBERT E. TOD, Commissioner of Immigration, Ellis Island, Port of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S POINTS.

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 241.

ESTHER KAPLAN,
Appellant,
against
ROBERT E. TOD, Commissioner of Immigration, Ellis Island, Port of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S POINTS.

Statement.

This is an appeal from an order dismissing appellant's petition for a writ of habeas corpus, the application having been heard by Hon. Henry W. Goddard, U. S. District Judge, on the petition for a writ of habeas corpus and the return to said writ. The writ was obtained following appellant's

detention under a warrant of deportation issued by the Assistant Secretary of Labor on January 19, 1923 (*Rec.*, pp. 5, 6). The assignments of error are as follows:

Assignments of Error.

1. The Court erred in not holding that this petitioner and appellant is a citizen of the United States and is wrongfully held and illegally imprisoned, and in dismissing her petition and remanding her into custody for deportation.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the 5th amendment of the Constitution of the United States.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for deportation (*Rec.*, pp. 2, 3).

The Facts.

The facts as stated in the petition (*Rec.*, pp. 4, 5) and as borne out by the mass of documents and correspondence contained in the record, may be summarized as follows:

(1) September 10, 1901, appellant was born in New Konstatyn, Russia.

(2) August 6, 1911, appellant's father, Sam Kaplan, arrived in the United States (*Rec.*, p. 6).

(3) July 20, 1914, appellant arrived in the United States accompanying her mother and two brothers. She was then certified by the public health authorities as being feeble-minded, and her

deportation was directed. Appellant, therefore, was within one of the excludable classes enumerated in Section 2 of the Immigration Act of 1907 (34 Stat. L., 898, as amended by 36 Stat. L., 263).

(4) October 7, 1914, appellant's mother was also sought to be excluded as an accompanying alien, and her younger brother as a person likely to become a public charge.

(5) May 19, 1915, the Department directed that all the aliens concerned be deported but "deportation was obstructed by the war, in view of which the Department authorized the aliens' temporary admission until such time as deportation could be effected with safety" (*Rec.*, p. 12).

(6) June 18, 1915, appellant was delivered to the care of the Hebrew Immigrant Aid Society of America, who agreed to act as her custodian, and to return her when required, and to prevent her becoming a public charge (*Rec.*, pp. 12, 39). Thereafter she resided with her father at 249 Monroe Street, New York City (*Rec., pp.* 16, 17, 20).

(7) On December 14, 1920, appellant's father was duly admitted to citizenship, and a certificate of naturalization was issued to him by the Supreme Court of the State of New York, New York County (*Rec.*, p. 6). The certificate lists among the "names, ages and places of residence of minor children" the appellant who was then 19 years of age and her place of residence as 249 Monroe Street (*Rec.*, p. 40).

(8) Under the law then in force petitioner's mother became a citizen of the United States upon the naturalization of her husband (*Rec.*, 39).

(9) On February 18, 1922, six years and nine

months after her release into the custody of the Hebrew Immigrant Aid Society, and more than a year after appellant became a citizen of the United States, through the admission of her father to citizenship, she was arrested under the Secretary's warrant, re-examined, was again certified to be feeble-minded and ordered to be deported.

(10) On January 19, 1923, the Department of Labor issued its warrant directing appellant's deportation to Ukrainia, the execution of the warrant being stayed until April 1st, 1923 (*Rec.*, pp. 5, 6).

(11) On April 24, 1923, a writ of habeas corpus was allowed by Hon. J. W. Mack, U. S. District Judge upon her petition setting forth these facts (*Rec.*, p. 3), but was dismissed on October 9, 1923, and she was remanded to the Commissioner of Immigration of the Port of New York (*Rec.*, p. 2).

POINTS.

I.

Upon the naturalization of the relator's father after she had come to this country to reside and while she was dwelling in the United States, she became in all respects and for all purposes, except as limited by the Constitution, a citizen of the United States.

By Article I, Section 8, of the Constitution, Congress is given the power to establish a uniform rule of naturalization. Pursuant to the power so

conferred the first naturalization law was enacted in 1790, and had been from time to time amended until it was re-enacted, substantially in its present form, in 1906.

By Article XIV, Section 1, of the Amendments to the Constitution, it is provided:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In *Osborn* v. *United States Bank*, 9 Wheat., 738, 827, Chief Justice Marshall declared the constitutional effects of naturalization in terms that have become classic. Says he:

> "A naturalized citizen is, indeed, made a citizen under an Act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, *possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native.* The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction; the law makes none."

In *Luria* v. *United States*, 231 U. S., 22, Mr. Justice Van Devanter said:

> "Under our Constitution, a naturalized citizen stands on an equal footing with a native citizen in all respects, save that of eligibility to the Presidency. *Minor* v. *Happersett*, 21 Wall., 162, 165; *Elk* v. *Wilkins*, 112 U. S., 94, 101; *Osborn* v. *Bank*, 9 Wheat., 738, 827."

A naturalized citizen, being thus endowed with the same rights as a native born citizen, is no more subject to deportation or to seizure by the Commissioner of Immigration or by any Immigrant Inspector, than a lineal descendant from the Pilgrim Fathers, born in this country, would be. By the process of naturalization the person who is naturalized becomes, in legal effect, identical with one who is natural born.

To take such a citizen into custody for the purpose of deportation, as an alien, constitutes a deprivation of liberty without due process of law within the meaning of the Fifth Amendment.

Ng Fung Ho v. *White*, 259 U. S., 276, 278.

In *United States* v. *Wong Kim Ark*, 169 U. S., 702, 703, Mr. Justice Gray said:

> "The Fourteenth Amendment of the Constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,' contemplates two sources of citizenship, and two only; birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof,

> becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts. The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

Let us then consider the terms of the naturalization laws in force on December 14, 1920, at the time of the naturalization of Sam Kaplan, the relator's father.

Referring to the United States Compiled Statutes of 1918 and its numeration of the sections, attention is called to Section 4352, which provides that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: First. He must make a declaration of intention. Second. Not less than two years nor more than seven years after he has made his declaration of intention he is required to make and file a petition, in which he shall state, among other things, "if he has children, the name, date and place of birth and place of residence of each child living at the time of the filing of his petition." The statute prescribes forms which are to be used in the proceedings to which they relate. The form for the petition for naturalization, in its seventh paragraph, is as follows:

"I have * * * children and the name, date and place of birth and place of residence of each of such children is as follows: * * *"

The form of the certificate of naturalization is then given, which, among other things, contains the following:

"Names, ages and places of residence of minor children: * * *"

The form of the stub of the certificate of naturalization is likewise prescribed. It contains, among other facts, the following:

"Names, ages and places of residence of minor children, * * *"

The certificate of naturalization issued to the relator's father is in strict conformity with these requirements (*fol.* 92).

Section 4367, which is in reality Section 2172 of the United States Revised Statutes, reads as follows:

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, *being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof;* and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."

The history of the section just quoted is to be

found in Vol. III of Moore's International Law Digest, pages 464-484, and contains not only references to court decisions but to opinions of various Attorneys-General and Secretaries of State which interpreted the section and gave effect to its provisions under a variety of circumstances, indicating a consensus of opinion that the language employed was to be broadly construed.

In one of the early cases, *Campbell* v. *Gordon*, 6 Cranch., 176, decided in 1810, the title to land depended upon the citizenship of one Yanetta Gordon, the daughter of William Currie, who was by birth a British subject. He emigrated to the United States and in 1795 was naturalized. His daughter Yanetta was then residing in Scotland, where she remained until 1797, when she came to the United States. It was contended that she was not a citizen of the United States inasmuch as she was not dwelling in the United States at the time of her father's naturalization. This Court, however, held to the contrary, Mr. Justice Washington taking the view that the words "if dwelling in the United States" referred to the coming into the United States of the minor children of one naturalized before they attained the age of twenty-one years even though the naturalization occurred prior to their coming.

The rule laid down in this statute was in *Boyd* v. *Thayer*, 143 U. S., 177, declared to be "a uniform rule" and Chief Justice Fuller added:

> "• • • We perceive no reason for limiting such a rule to the children of those who had been already naturalized. In our judgment the intention was that the act of 1802 should have a prospective operation."

In an opinion rendered by John Hay, Secretary

of State, on January 22, 1900, Foreign Relations 1900, 13-15, which is transcribed on pages 470-472 of the volume of Moore to which reference has been made, that great statesman said:

> "Still another view is brought forward, to the effect that the protective force of Section 2172 only applies to the minor children of naturalized aliens while such minor children are actually within the jurisdiction of the United States. This narrow interpretation is no longer entertained by the Department, although as a proposition in municipal law it has on several occasions in the past been enunciated; but it has been replaced in practice by a quasi conventional interpretation, as will be later shown, by which the acquisition of a parent's citizenship by an alien minor is assimilated to the actual naturalization of the minor himself."

He then refers to an instruction sent by Mr. Blaine to Minister Phelps, at Berlin, on February 1, 1890, which it is stated was prepared by Mr. John Bassett Moore, then Assistant Secretary, which was that the effect of the American law is to make actual residence in the United States and not residence at the time of naturalization, the test of the claim of citizenship. He then proceeds:

> "In respect to such persons the words 'if dwelling in the United States' recognize a possible conflict of allegiance. In the absence of any such conflict of allegiance being adversely raised by the Government within whose jurisdiction the minor may be temporarily dwelling, there could be little doubt that the law of the country which naturalized the father would obtain; and in fact it does obtain, by common consent, in the relations of the United States with Germany. In practice, therefore, it may

be said that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child, if he be at the time of the father's naturalization within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority. The principle may be broadly stated that no country can naturalize an inhabitant of another country while that person is dwelling within the jurisdiction of the other country; that naturalization is a municipal act valid within the jurisdiction of the naturalizing power, and that, once performed, by due operation of law, it is entitled to respect. It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. *The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the Court.*" (Italics ours.)

At pages 473-478 of the volume of Moore to which reference has been made, there is an interesting opinion by Mr. Wharton, Acting Secretary of State, to Mr. Phelps, the writer being one of the great authorities on international law. It was the case of one John Haberacker, who was born in Bavaria. His father was a subject of that kingdom and died there when his son John was fourteen years of age. The widow emigrated to the United States, bringing her minor children with her. Three years later, when John was seventeen years of age, she married a naturalized American citizen. It was decided that upon her marriage she became a citizen of the United States, and that by virtue

of that fact her minor son, pursuant to the interpretation given to Section 2172 of the United States Revised Statutes, likewise became a citizen.

In *Conover* v. *Old* (1910), 80 N. J. Law, 535, 77 Atl. Rep., 1070, Mr. Justice Swayze, referring to the dispatch from Secretary Hay which we have cited from Moore, said:

> "We think that the rule adopted by the State Department is based upon sound reasoning. The natural and ordinary relationship between a father and his minor children is that of one family, and where the family is separated by distance and the children dwell under a different sovereignty from the father, this natural and ordinary relationship is disturbed by the necessity of the case, because of the claims of a foreign government upon persons dwelling within its jurisdiction, and perhaps because of a consideration of the right of the child not to be expatriated without its consent; but it ought not to be disturbed more than is required by the necessities of the case, and that necessity no longer operates where the child leaves the jurisdiction of the foreign government and rejoins the father. The language of the statute is not such as to require us to hold that the child must dwell within the United States at the time of the father's naturalization. The language is that the children 'shall, if dwelling in the United States, be considered as citizens thereof'; and the words 'if dwelling in the United States' may be referred with as great propriety to the period covering the nonage of the child or the time when the privileges of citizenship are claimed, or both, as to the time when the father is naturalized; and such construction would be in harmony with the well settled construction that holds that the section is prospective in its operation and not limited to the time of the passage of the act of 1802."

We have cited these authorities in order to indicate the liberality of interpretation which has been accorded to this statute. Here, however, reading the section in its most literal sense, namely, that the minor child must be actually dwelling in the United States at the time of the naturalization of the parent, that condition unquestionably existed, the relator having come to this country in July, 1914, and actually living with her father in the City of New York from June 18, 1915, to and including December 14th, 1920, the day of her father's naturalization.

See also:

Behrensmeyer v. *Kreitz,* 125 Ill., 141; 135 Ill., 591;
Dorsey v. *Brigham,* 177 Ill., 250;
Rexroth v. *Shein,* 206 Ill., 80;
Gunn v. *Hubbard,* 97 Mo., 321;
Young v. *Peck,* 21 Wend., 389;
Sutliff v. *Forgey,* 1 Cow., 89; affd. 5 Cow., 713;
West v. *West,* 8 Paige, 433.

As indicating the extent to which the authorities have gone, attention is called to *United States* v. *Kellar,* 13 Fed Rep., 82; *People* v. *Newell,* 38 Hun, 78, and *In re Graf,* 277 Fed. Rep., 969, where it was held that the minor child of an alien widow becomes a citizen *upon the naturalization of his mother's second husband.*

This brings us to a consideration of *Zartarian* v. *Billings,* 204 U. S., 170, which will naturally be relied upon by the respondents. The petitioner, a former subject of Turkey, became a naturalized citizen of the United States in 1896. His daughter

Mariam was born in Turkey and with passports procured by her father left Turkey for the United States, arriving at Boston on April 18, 1905. She was debarred from landing by a board of special inquiry appointed by the United States Commissioner of Immigration, because she was found to have trachoma. The father, contending that she was a citizen of the United States by reason of his naturalization, instituted *habeas corpus* proceedings. It was held that the naturalization laws do not confer citizenship upon the minor children of a naturalized alien who were born abroad and who remained abroad until after their parent's naturalization, and that such children are aliens, subject as to their entrance to the United States to the provisions of the Immigration Act.

In the course of the opinion of Mr. Justice Day reference is made to the rulings of the State Department collected in Moore's Digest of International Law, and especially to the instructions from Mr. Blaine to Minister Phelps which we have above quoted, in which it was laid down that the naturalization of the father operated to confer the municipal right of citizenship upon the minor child if at the time of the father's naturalization dwelling within the jurisdiction of the United States or if she came within that jurisdiction subsequent to the father's naturalization and during her own minority. The opinion then proceeds:

> "Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parents' naturalization, but coming therein during minority, acquires citizenship is not a question now before us. The limitation to children 'dwelling in the United States' was doubtless inserted in recog-

nition of the principle that citizenship cannot be conferred by the United States on the citizens of another country when under such foreign jurisdiction; and is also in deference to the right of independent sovereignties to fix the allegiance of those born within their dominions, having regard to the principle of the common law which permits a sovereignty to claim, with certain exceptions, the citizenship of those born within its territory. It is pointed out by Mr. Justice Gray, delivering the opinion in *United States* v. *Wong Kim Ark*, 169 U. S., 649, 686, that the naturalization acts of the United States have been careful to limit admission to citizenship to those 'within the limits and under the jurisdiction of the United States.' The right of aliens to acquire citizenship is purely statutory; and the petitioner's child having been born and remained abroad, clearly does not come within the terms of the statute. *She was debarred from entering the United States by the action of the authorized official, and, never having legally landed, of course, could not have dwelt within the United States.*" (Italics ours.)

It is, therefore, clear that that decision proceeded solely on the ground that the minor child was not permitted actually to land in the United States, and, therefore, in no sense of the word could she be regarded as dwelling in the United States.

In the case now before the Court the relator actually landed on June 18, 1915, after being detained on Ellis Island since July, 1914 (*fol.* 89); she was permitted to proceed to her father's home, where she actually dwelt at the time when her father became naturalized five and a half years later—December 14, 1920 (*fol.* 89). Thereupon, *ipso facto,* she ceased to be an alien and became a citizen. Far from being debarred from landing,

relator was permitted to do so, and before any deportation proceedings were instituted her acquired citizenship intervened to debar her deportation.

The same situation existed in *United States ex rel., DeRienzo* v. *Rodgers*, 185 Fed. Rep., 334, as in *Zartarian* v. *Billings* (*supra*). There the relator was a minor fourteen years of age, a native of Italy. He arrived at Philadelphia from Naples on July 31, 1910. On the same day the board of special inquiry constituted under the Immigration Act decided that the relator was an idiot, and excluded him from admission into the United States. It appeared that the father of the relator was naturalized on April 12, 1909, and it was by reason of such naturalization that the relator claimed the right to enter as a citizen. The relator, however, at no time dwelt within the United States; was not permitted to enter. Consequently it was a physical impossibility for him to dwell or reside here. The case, therefore, came within the ruling in *Zartarian* v. *Billings*, *supra*. The conclusion reached by the Court, as expressed by Judge Gray, was:

> "We must, therefore, conclude that under the provisions of that section the naturalization of the father in the United States will not permit his minor children born abroad and remaining in the country of their nativity until after his naturalization, to come into the United States if they are idiots, feeble minded, * * * or otherwise prohibited from entering the United States by the immigration laws thereof."

U. S. v. *Ju Toy*, 198 U. S., 253, *Chin Yow* v. *U. S.*, 208 U. S., 122 and *U. S. ex rel., Abdoo* v.

Williams, 132 Fed. Rep., 894, are likewise clearly distinguishable. In none of them did the immigrant pass out of the custody of the immigration authorities. They may have left the ships on which they sailed hither, but they were not permitted to go at large and to dwell elsewhere. In two of the cases the immigrant was practically locked up; in the third he was detained at Ellis Island. This was likewise true in *Nishimura Ekiu* v. *U. S.,* 142 U. S., 651 and *In re Gayde,* 113 Fed. Rep., 588, which are likely to be cited by the respondents in the present case. In the first of them the immigrant was placed in the custody of the Methodist Episcopal Japanese and Chinese Mission pending the decision of the question of her right to land and was kept there by an agreement between her attorney and the U. S. Attorney as a more suitable place than the steamship. In the latter the immigrant was merely permitted to go on shore while the Board of Special Inquiry was examining the case.

United States ex rel., Patton v. *Tod,* 297 Fed., 396, writ of certiorari granted by this court at this term, is in an important particular distinguishable from the instant case. There the relator arrived at the Port of New York on July 6, 1914, and upon medical examination she was certified to be an imbecile. *She was at once excluded, and, with an attendant was placed on board a steamship for deportation* July 20, 1914; *the deportation was actually commenced;* the vessel began its voyage, but, owing to the war, was compelled to return to New York. Thereafter on August 6, 1914, the alien was permitted to enter under a temporary bond, and her father later became naturalized.

We however contend that regardless of the distinguishing feature adverted to the decision of the learned court in that case is erroneous. It not only failed to distinguish the significance of Section 5 of the Act of March 2, 1907 (34 Stat. L., 1229), from that of Section 2172 Rev. Stat., but we believe, gave it an incorrect interpretation.

We likewise contend that the decision rendered in *U. S. ex rel., Goldman* v. *Tod,* by Judge Cooper in the District Court for the Northern District of New York, is unsound. An appeal was taken from that judgment to the Circuit Court of Appeals for the Second Circuit, but was not argued, the Secretary of Labor in the exercise of a discretionary power conferred on him by the Immigration Law of 1924, having admitted the relator.

On the other hand, in *United States ex rel., Sejnensky* v. *Tod,* 285 Fed. Rep., 523, decided by the Circuit Court of Appeals for the Second Circuit, it appeared that the relator, who had been ordered deported as a feeble minded person and released on bond to visit her relatives in this country and who while on bond married an American citizen, became herself an American citizen under section 1994 of the United States Revised Statutes. It was likewise held that the provision of the Immigration Act of 1917, Section 19 that marriage to an American citizen of a sexually immoral female shall not give her citizenship, if it is solemnized after her arrest, or after her commission of acts which make her liable to deportation is a construction by Congress that, in the absence of that enactment, such a marriage would make the woman a citizen and prevent her deportation, and was a manifestation of intention that the marriage of a

woman to a citizen should confer citizenship except in the case specified.

In the course of the opinion of Judge Rogers, after citing *United States* v. *Kellar,* 13 Fed. Rep., 82, in which the opinion was written by Mr. Justice Harlan, *Hopkins* v. *Fachant,* 130 Fed. Rep., 839, decided by the Circuit Court of Appeals for the Ninth Circuit, *United States* v. *Williams,* 173 Fed. Rep., 626, decided by Judge Learned Hand and affirmed in 184 Fed. Rep., 322, as well as *Ex Parte Grayson,* 215 Fed. Rep., 449, appeal dismissed 219 Fed. Rep., 1022, he said:

> "So in this case, if after the making of the order of exclusion and while she is permitted temporarily to remain she in good faith marries an American citizen, we cannot doubt the validity of her marriage, and that she thereby acquired, under international law and under Section 1994 of the Revised Statutes, American citizenship and ceased to be an alien. *Thereupon the immigration authorities lost their jurisdiction over her, as that jurisdiction applies only to aliens, and not to citizens.*"

The opinion of Attorney-General Wickersham, 27 Op. Atty. Gen., 507, cited by Judge Rogers, is also directly in point.

In *Hopkins* v. *Fachant, supra,* the alien woman came to the United States from France and entered the country contrary to the immigration laws, she being a prostitute. The immigration authorities took her into custody at the port of New York with a view of deporting her. She applied for her release under a writ of *habeas corpus,* and pending the disposition of the matter she married a naturalized American citizen. Yet it was held that she was entitled to a discharge from custody because

she had become a naturalized citizen of the United States.

In the case in which Attorney-General Wickersham, *supra*, rendered the opinion the same facts existed. An unmarried immigrant woman was taken before a United States Commissioner in proceedings under the Immigration Act for her deportation on the ground that she had entered this country for the purpose of prostitution and had been found an inmate of a house of prostitution. After she was taken before the United States Commissioner but prior to her arrest under a warrant by the Department of Justice, she was married to a native born citizen of the United States. The Attorney-General ruled against the right to deport her because she had become an American citizen.

It is impossible to differentiate these cases from the present. If the marriage in the *Sojnensky case* of the feeble-minded person who was released on bond after she had been ordered to be deported, and the marriage of the prostitutes after deportation proceedings had been instituted, both under suspicious circumstances, effectively made them naturalized citizens and nullified the deportation proceedings instituted against them, then the naturalization of the relator in the present case, which resulted automatically from the naturalization of her father after she had come to this country, would render ineffective the deportation proceedings which have been instituted against her and would entitle her to a discharge. Had she married a citizen in the interim between 1915, and the adoption of the Cable Act, she would have at once become invested with all of the rights of citizenship. There can be no possible question as to the bona fides of the father's naturaliza-

tion. Even if the relator had not been named upon the certificate of naturalization, the acquired citizenship of the father would carry with it the citizenship of his minor children, especially where they had come to this country prior to such naturalization and were abiding here at the time of such naturalization.

See also:

North Noonday Mining Co. v. *Orient Mining Co.*, 1 Fed. Rep., 522;
State v. *Mims*, 26 Minn., 183; 2 N. W., Rep., 294;
Savage v. *Umphries*, 118 S. W. Rep., 893.

It is appropriate at this stage of the argument to consider the phrase contained in Section 2172, "if dwelling in the United States," which was considered in the authorities above cited.

The term "dwelling," as used in this section, is not to be given an abnormal interpretation. It relates to the status of minor children who are in the United States, as affected by the naturalization of their parents. It is not used in a technical sense, but more in a colloquial sense; otherwise the term "residing" or "domiciled" would have been employed.

The verb "to dwell" is synonymous with the words "to have an abode or habitation," whether it be temporarily or permanently; to have a home; to live. A "dwelling" is a habitation, an abode, a lodgment. It is sometimes used in the sense of a residence.

It is in this sense that these words repeatedly appear in the Bible, as e. g., in Psalm 120, v. 5:

"Woe is me, that I sojourn with Meshech,
That I dwell beside the tents of Kedar."

And Hamlet's phrase is well known:

"There's ne'er a villain dwelling in all Denmark,
But he's an arrant knave."

In this case, after Esther Kaplan left Ellis Island her place of abode, her habitation, her dwelling, was with her father, and nowhere else. In various of the official communications which are in the record, it is recognized that she dwelt with her parents.

In the recommendation for deportation by the Assistant Commissioner in charge at Ellis Island (*Rec.*, pp. 14, 15), referring to the appellant, it is stated that "she is residing with her parents, Sam and Chana Kaplein, first floor, 249 Monroe Street, New York City."

In the proceedings for her examination it is stated (*Rec.*, p. 16), "she is residing with her parents, 249 Monroe Street, New York City."

On the hearing in connection with the deportation proceedings, she was asked by the Government inspector (*Rec.*, p. 17):

"Q. With whom are you residing at 249 Monroe Street, New York City? A. My father, Samuel Kaplein."

Again, at page 23 of the Record, in the summary of the proceedings, the immigrant inspector stated that the appellant "is residing with her parents at 249 Monroe Street, New York City." The same statement is made on page 24 and 31 of the Record.

It further appears that as early as in 1914, when she arrived in this country with her mother, the father lived at 242 Monroe Street, New York City (*Rec.*, pp. 33, 35), and that at the time of his naturalization, as shown by the certificate, he, his wife and his children, including Esther, resided at 249 Monroe Street (*Rec.*, p. 40). That, therefore, had been her abiding place from the time she left Ellis Island.

It would be doing violence to a word in common use to say that she did not, within the meaning of this statute, "dwell" in the United States, and particularly at 249 Monroe Street, New York City, at the time of her father's naturalization. That was the only place that she could call home. It was there that she had her local habitation. After having lived there for more than six years, it is indulging in grim humor to say that she did not dwell in the United States. It is natural to inquire, how many more years was it necessary for her to abide at that spot, where her parents provided for her and sheltered her, where she took her meals and where she lodged, before it could be said that she dwelt there? Would a continuance of that condition for ten, or fifteen or twenty years have finally made it her dwelling place?

A statute of this character must be reasonably interpreted, and not in such a manner as to deprive words of their ordinary significance.

II.

The paroling of the relator and her admission in the custody of the Hebrew Immigrant Aid Society did not prevent her from acquiring citizenship on her father's naturalization, or neutralize the effect of her dwelling and residing in the United States.

This has been authoritatively decided in *U. S. ex rel., Sejnensky* v. *Tod*, 285 Fed. Rep., 523, which cannot be too much emphasized in this phase of the case. The fact that the relator there, was a woman, while the relator here was, at the time of her father's naturalization, a minor girl, does not set forth a sound distinction; certainly not in so far as the legal consequences of the giving of a bond are concerned. If the Sejnensky woman, who had been declared feeble-minded, and had given a bond could nevertheless be regarded as having landed and as residing here sufficiently to become a citizen on her marriage to an American citizen, then by the same token, Esther Kaplan, although declared feeble-minded and permitted to remain here, dwelt here sufficiently to satisfy the requirements of Section 2172, and to make her a citizen on her father's naturalization.

Further comments are appropriate regarding paroling of appellant:

1. It was not consented to by Esther Kaplan, or by her father, but only by the Hebrew Immigrant Aid Society.

2. Esther Kaplan was an infant, incapable of making a contract, because of her infancy. Hence

she cannot be deemed estopped by any of the vague terms of the arrangement paroling her.

3. The action of the Government in placing the relator in the custody of the Hebrew Immigrant Aid Society did not in any way bind her or make her entry into the United States anything other than what she intended it to be, viz., for the purpose of dwelling or residing in the home of her parents, who were her natural protectors. That was her intention, as well as her father's, and that intention was consummated openly and with the sanction of the Government authorities (*Rec.*, pp. 17, 20).

4. If her entry into the United States can be said to have been conditional, it was not upon a condition precedent, but a condition subsequent. It did not change the legal effect of her actual "dwelling in the United States," when her father became naturalized. On the contrary her entry was lawful. It was open, not surreptitious. It was in strict conformity with law. The condition imposed, if such it may be called, was not one which invalidated her act of "dwelling" or "residing" in New York City, *in so far as the Naturalization Law was concerned.* If her father became naturalized while she was thus "dwelling in the United States," surely, when the Immigration authorities subsequently sought to avail themselves of the condition subsequent, the relator had lawfully become a citizen of the United States, just as her act of dwelling in the United States at the time of her father's naturalization was entirely lawful. Her acquisition of citizenship annulled the condition subsequent. As to the effect of conditions subsequent, see 18 *Corpus Juris* title "Deeds" Sections 368-370, 383.

III.

The decree of the New York Supreme Court naturalizing Sam Kaplan and referring, as required by statute, to his minor children, including the relator, who was described in the naturalization papers as residing in the United States, is a judgment of a court of competent jurisdiction, which cannot be questioned collaterally, as respondents are seeking to do in these proceedings.

It is well settled that a decree of naturalization has all the qualities of a judgment. It implies verity and is conclusive, just as any other judgment would be. If it can be attacked at all, it can only be in a direct proceeding and not indirectly and collaterally, as is now attempted. It is not pretended that there was any fraud or deception in the proceeding. It was in every way regular. The reference to Esther Kaplan was necessary by the express terms of the Naturalization Law. It is difficult to see any ground which would justify even a direct attack. At all events for the purposes of this case it cannot be questioned.

United States v. *Aakervik,* 180 Fed. Rep., 137;
Ex Parte Grayson, 215 Fed. Rep., 449.

In the case last cited, an immigrant woman, about to be deported, married a citizen, as claimed by the Government with the object of evading deportation. The fact of marriage and of consequent citizenship was urged in *habeas corpus,* as a bar to

deportation. It was held that even if it were true that the marriage was conceived in fraud and in order to prevent deportation in evasion of the immigration law, these facts could only avail in an action instituted for the purpose of annulling the citizenship of the immigrant, and that the Departmen of Labor had no jurisdiction to deport the petitioner.

The doctrine of *res judicata* applies in full vigor to the present case; every essential to an estoppel by judgment being found in the record now before the court.

IV.

There is nothing in Section 5 of the Act of March 2, 1907 (34 St. L., 1228) which militates against our contention, even were that section applicable.

It is contained in an act entitled "An Act in reference to the expatriation of citizens and their protection abroad." The first section relates to passports to persons after declaration of intention and the extent of the protection to which they are en titled under their passports. The second section relates to expatriation and to the residence abroad of naturalized persons. The third applies to American women married to foreigners and their resumption of their citizenship upon the termination of the marital relation. Section 4 deals with foreign women married to Americans and to the presumption of their retaining their citizenship unless there be a formal renunciation of it. Section 5 relates to the children of alien parents, born with-

out the United States; Section 6 to children born abroad and who continue to reside outside the United States; Section 7 to evidence, registration, or other acts required to be filed with the Department of State for record.

It is thus evident that this entire Act deals solely with the subject of expatriation. Section 2172 of the United States Revised Statutes, which we have heretofore considered, is in no way repealed. It is still recognized as in full force and effect. It is contained in every compilation of the naturalization laws which has been made since 1907. It has never been suggested that there was an intention to repeal it by implication. Had there been such a purpose it would have been clearly expressed in view of the importance of the subject.

The same argument that has led the courts to regard Section 2169 of the United States Revised Statutes as surviving the codification of the Naturalization Law made in 1906, would lead to the inevitable conclusion that Section 2172 likewise remains the law.

United States v. *Balsara*, 180 Fed. Rep., 694.
Ozawa v. *United States*, 260 U. S., 178.
United States v. *Thind*, 261 U. S., 204.

Section 5 of the Act of 1907 reads:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization or resumption of American citizenship by the parent: provided, that such naturalization or resumption takes place during the minority of such child: And provided further, that the citizenship of such minor

child shall begin at the time such minor child begins to reside permanently in the United States."

Notwithstanding the resemblance in some respects of this section to Section 2172 of the United States Revised Statutes, it is evident that it is intended to cover a different state of facts from that described in the Naturalization Act, and that it deals merely with the subject of expatriation. But even if this were not the case, as applied to the facts set forth in the petition herein, the relator, having begun a permanent residence in the United States, would have all the rights of a citizen.

Although in *United States* v. *Rodgers, supra,* the Court referred to Section 5 of the Act of 1907, the decision was in fact based upon the interpretation of Section 2172 of the United States Revised Statutes, which was regarded as being in full force. As applied to the facts of that case the operation of both sections would have been the same, because the minor children in that case neither began a permanent residence nor dwelt within the United States. At the time when their father became naturalized, the childen were physically detained by the Government.

We have examined the Congressional Record dealing with the history of the enactment of the Act of March 2, 1907 and find that the Act was passed at the request of the Department of State in order to remedy abuses practiced by certain naturalized citizens living abroad, claiming the protection of the American Flag and having no intention of returning to this country. It was not the intention of Congress by this Act to change in any material respect the naturalization laws of the United States.

We quote from the Congressional Record of the Fifty-ninth Congress, Second Session, from the remarks of Mr. Perkins, Chairman of the Committee on Foreign Affairs in charge of this particular bill. Under the rule laid down in *Duplex Co.* v. *Deering*, 254 U. S., 443, 474, his explanation may be regarded as an exposition of the legislative intent. He said (Congressional Rec., 1464):

> "Mr. Speaker, I think the gentleman will find that *there are no provisions in this law that conflict with the naturalization laws.* This bill was unanimously reported from the Committee on Foreign Affairs at the request of the Department of State, and in answer to a report made, which the gentleman may have seen, by a committee appointed by the Secretary of State to investigate and report upon certain evils which have arisen in the Department of State, chiefly in reference to the issue of passports and the protection exercised by this Government in favor of its citizens in other countries. * * *"

With relation to Section 6 of the Act which afterwards was changed to read as Section 5 and with which we are now concerned, the following colloquy took place (Congressional Rec., 1465):

> "Mr. Bonynge: Mr. Speaker, section 6 of the bill I do not know that I thoroughly understand. That section provides that a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization, or the resumption of American citizenship by the parents. In what respect does that change existing law, I will ask the gentleman from New York?
>
> "Mr. Perkins: Mr. Speaker, that only changes existing law to meet the provision of

> this bill which gives to the woman who has married a foreigner, where the marriage relations have been terminated, the right to resume her citizenship. Under this act the children of such a woman would have the same right as the children of aliens to take American citizenship by coming to this country to reside permanently. Otherwise I do not think it changes the law."

It will thus be seen that the reason for the passage of the bill was not to amend the existing naturalization law but had reference to an evil with which we are not concerned in the instant case. Moreover, the phrase "to reside permanently" had no reference to any restriction arising from the immigration laws of the United States, but related solely to the intention of the children and their parents to reside permanently in the United States.

Had there been any intention to supersede section 2172, it would have been simplicity itself to have said so. The Act of 1907 does not provide for the repeal of that section. Nor is there any justification for an argument that it operated as a repeal of section 2172 by implication. The fact that the two provisions relate to different subject-matters negatives such an intent. It is fundamental that repeals by implication are not favored and will not be held to exist, if there be any other possible construction.

Washington v. *Miller*, 235 U. S., 422.
Rainey v. *Grace*, 231 U. S., 703.
Ex Parte Webb, 235 U. S., 663.
Texas &c. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S., 426.
Gibson v. *U. S.*, 194 U. S., 182.
Ward v. *Race Horse*, 163 U. S., 511.
Red Rock v. *Henry*, 106 U. S., 596.

To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled.

U. S. v. *Greathouse*, 166 U. S., 605.
Smith v. *Townsend*, 148 U. S., 499.
Washington &c. R. Co. v. *Harmon*, 147 U. S., 587.
Cope v. *Cope*, 137 U. S., 686.
The Distilled Spirits, 11 Wallace, 356.
U. S. v. *American Bell Tel. Co.*, 128 U. S., 315.

If the later act is not repugnant to the earlier and containing no negative words is not clearly intended to cover the whole ground of the earlier, there is no implied repeal.

U. S. v. *New York*, 160 U. S., 598.
Frost v. *Wenie*, 157 U. S., 46.
Savannah v. *Kelly*, 108 U. S., 184.
Henderson's Tobacco, 11 Wall., 652.

As said by Attorney General Black in terms that have become classic (9 Op. Atty. General, 47):

> "It is so easy for the legislative in making one law, to say that another law on the same subject is repealed, and when it is meant, it is so likely to be said, that we never presume it when it is not said, unless the two laws are in such palpable conflict that both cannot be executed."

A long established policy of the government can scarcely be held to have been abrogated by an im-

plied repeal of a statute enacted in furtherance of that policy.

U. S. v. *Munday*, 222 U. S., 175.
Fussell v. *Gregg*, 163 U. S., 565.

So also it was said by Mr. Justice Strong in *U. S.* v. *Gillis*, 95 U. S., 416:

> "It may be doubted whether a statute relating to one subject can be construed to repeal by implication a prior statute relating entirely to another subject."

The Government has never regarded section 2172 repealed. In the pamphlet issued by the U. S. Department of Labor, entitled "Naturalization Laws and Regulations," that section is set forth on pages 28 and 29 as an existing law, and is immediately followed by the Act of March 2, 1907, bearing the caption: "Expatriation of Citizens and their Protection Abroad" (pp. 29, 30).

It is, therefore, a proposition, clear beyond doubt, that the Act of 1907 did not repeal section 2172 and that the latter alone is applicable to the facts of this case.

Is it necessary to point out the difference between the phrases "if dwelling in the United States" contained in section 2172, and "the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States," employed in the Act of 1907? If the appellant did not "dwell" in the United States, after she took up her abode in her father's habitation on Monroe Street in the City of New York, where did she "dwell"? Certainly not in Russia; certainly not on the ship which brought her to this country, or

at Ellis Island. Nor did she dwell *in nubibus*. The only home she had was with her parents. It was there that she was provided for; there she lodged; from there she went to school; there lived the family of which she formed a part, and there she was usefully occupied. When her father was naturalized they dwelt together within the jurisdiction of the United States, which granted citizenship to both; to her father because of compliance with the statutory requirements; to her because she dwelt with her father in the United States.

If Congress had intended to qualify the right of a minor child of a naturalized citizen, to become a citizen by virtue of his naturalization, in the case of a feeble-minded person, it would have so stated in some act or acts dealing with naturalization. The subject was discussed in *United States* v. *Tod*, 285 Fed., 523 (supra), where at page 531 the Court said:

> "(2) If Congress intended that the marriage of an American citizen with an alien woman of any of the other of the excluded classes, either before or after her detention, should not confer upon her American citizenship thereby entitling her to enter the country, its intention would have been expressed, and section 19 would not have been confined solely to women of the immoral class."

It must be presumed that Congress had humane intentions, that it did not intend to disrupt families and that it contemplated, wherever possible, to unite each family under a single sovereignty.

V.

There is nothing in the Immigration Act of 1917 which in any way affects Section 2172 of the United States Revised Statutes.

That statute, which was enacted in the light of the previous decisions, and which was designed to be complete in itself, is a minute codification of the law relating to immigration. At the time of its enactment most of the decisions referred to under Point I had been rendered, and their effect must have been fully understood by the Department of Labor, which was naturally consulted regarding the enactment if it did not actually originate, that statute. The subjects of immigration and naturalization were both within the jurisdiction of that Department. If it had been intended, therefore, to change the law applicable to such a case as the present, it would have been the most natural thing in the world to have done so. The entire statute, though most elaborate, is silent on the subject; as is likewise the Immigration Act of May 19, 1921, and the Joint Resolutions of May 11, 1922, and December 27, 1922, and the Immigration Act of 1924. In fact the Act of May 19, 1921, strengthens our argument, because it defines the word "alien" as including "any person not a native born or naturalized citizen of the United States."

From the beginning to the end of the existing Immigration Law "aliens" alone are dealt with. There is no suggestion that persons in the situation of the relator, after they become naturalized in the manner in which she became naturalized, are

in any way affected. There are provisions with regard to the detention of aliens for observation and examination (Sec. 1); for the inspection of alien passengers on arrival and for their temporary removal for examination "until they are either allowed to land or returned to the care of the line or to the vessel which brought them" (Sec. 15); for the deportation within a certain time of aliens entering or found in the United States in violation of law (Sec. 19); with regard to the ports to which aliens are to be deported and the cost of deportation (Sec. 20); with respect to the admission of aliens liable to be excluded on giving a bond or making a cash deposit (Sec. 21); with respect to the temporary detention and admission or deportation in case of contagious disorder of the wife or minor child of the naturalized alien or resident alien (Sec. 22).

If it had been intended to depart from the interpretation given to Section 2172 of the United States Revised Statutes, that idea would have been clearly expressed, as it would have been suggested by the elaborate provisions which were inserted in the Act on the subjects named. In fact the inference that it was not intended to change the rule laid down in Section 2172 of the United States Revised Statutes as interpreted, is, as was pointed out by Judge Rogers, speaking for the United States Circuit Court of Appeals for the Second Circuit in *United States, ex rel., Sejnensky* v. *Tod, supra,* made absolutely clear by the proviso contained in Section 19, namely, "that the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the

marriage of such alien female shall be solemnized after her arrest or after the commission of the acts which make her liable to deportation under this Act."

The rule *expressio unius est exclusio alterius* applies here in all its vigor. The care with which this proviso was framed negatives the idea that the law with regard to the effect of naturalization is in any other respect modified in its application to an immigrant.

Section 21 likewise strengthens our position, because in the case of the giving of a bond or the making of a cash deposit for the purpose of "holding the United States and all states, territories, counties, towns, municipalities and districts thereof harmless against such alien becoming a public charge," it provides:

> "In the event of the permanent departure from the United States, the *naturalization*, or the death of such alien, the said sum shall be returned to the person by whom furnished, or to his legal representatives."

The same is true of Section 22, which relates to the temporary detention in the case of contagious disorders of a wife or minor child of a naturalized alien or resident alien. As to this we find the proviso:

> "That if the person sending for wife or minor children is *naturalized*, a wife to whom married or a minor child born subsequent to such husband or father's *naturalization* shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's *naturalization* the provi-

sions of this section shall be observed, even though such person is unable to pay the expense of treatment."

But even were Section 5 of the Act of March 2, 1907, applicable rather than Section 2172 of the Revised Statutes, then we contend, that upon the conceded facts the appellant had begun to reside permanently in the United States before the naturalization of her father, within the fair intendment of the act.

VI.

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is, therefore, a denial of an essential jurisdictional fact and is to be tested by means of the writ of habeas corpus.

The law on this subject has been recently settled in *Ng Fung Ho* v. *White*, 259 U. S., 276, 278, which related to a Chinese person who was sought to be deported and claimed American citizenship. Mr. Justice Brandeis there said:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the miltary service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex parte Reed*, 100 U. S., 13; *In re Grimley*, 137 U. S., 147; *In*

re Morrissey, 137 U. S., 157; *Johnson* v. *Sayre*, 158 U. S., 109. Compare *Ex parte Crow Dog*, 100 U. S., 556. If the jurisdiction of the Department of Labor may not be tested in the Courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive, *United States* v. *Ju Toy*, 108 U. S., 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow* v. *United States*, 108 U. S., 8, or the finding was not supported by evidence, *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94, or there was an application of an erroneous rule of law, *Gegiow* v. *Uhl*, 239 U. S., 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow* v. *United States*, 208 U. S., 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this Court. Compare *United States* v. *Woo Jan*, 245 U. S., 552, 556; *White* v. *Chin Fong*, 253 U. S., 90, 93.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in *Chin Yow* v. *United States*, supra, and approved in *Kwock Jan Fat* v. *White*, 253 U. S., 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the

Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that Court of the question of citizenship and for further proceedings in conformity with this opinion."

VII.

More than five years having elapsed between appellant's release from Ellis Island and the issuance of the warrant for her deportation, she was within the protection of Section 20 of the Immigration Act of February 20, 1907 (34 Stat. L., 904) or of Section 19 of the Immigration Act of February 5, 1917 (39 Stat. L., 889).

Appellant was released from Ellis Island on June 18, 1915. The warrant for her deportation was not issued until January 19, 1923. It is true that at any time after she was released from the custody of the Government, in 1915, the Government could demand her return. There must, however, be some limit upon the right of the Government to demand her person. The abhorrence of stale claims so often expressed by Courts of Chancery and at common law should be equally as potent when applied to a demand for the production of a human body as it is to a demand for the payment of an indebtedness. It has been held innumerable times that the Statute of Limitations begins to operate on a demand note or bond from the date thereof.

Martin v. *Stoddard*, 127 N. Y., 61;
Mills v. *Davis*, 113 N. Y., 244;
Wennam v. *Mohawk Insurance Co.*, 13 Wend., 268.

In passing upon the Immigration Acts of 1903 and 1907 this Court has held in *Lewis* v. *Frick*, 233 U. S., 291, 297, and in *Lapina* v. *Williams*, 232 U. S., 78, that the period within which deportation must occur runs from "the time of the prohibited entry."

And see *United States* v. *Redfern*, 180 Fed., 506.

Section 20 of the Immigration Act of February 20, 1907 (34 Stat. L., 904), provides:

> "That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing *prior to landing*, shall upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported. * * *"

Section 21 of the same statute (34 Stat. L., 905), reads in part:

> "That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United Sfates, he shall cause such alien, within the period of three years *after landing or entry* therein to be taken into custody and returned to the country whence he came as provided by Section 20 of this Act. * * *"

These sections were in effect in 1915 at the time appellant was released from the physical control of the Government and *landed* or *entered* at New York City. The inaction of the Government for almost seven years thereafter permitted these sections to become operative in her favor.

By Section 19 of the Immigration Act of February 5, 1917 (39 Stat. L., 889), it is provided:

> "that at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * *"

This section plainly provides for a five-year statute of limitations upon the Government's right to deport an alien of a class excluded by law, such as the appellant herein who, being declared feeble-minded, was in one of the classes enumerated in Section 3 of the same Act.

Even if appellant's *entry* into the United States was not within the purview of the Act, which we insist it was, there can be no question but that at the time the warrant of deportation was executed she was "*found* in the United States," for such is the jurisdictional recital in the warrant itself (*Rec.*, p. 6, 1st *line*), and she was, therefore, protected by the provision of Section 19.

In a case similar to the instant case arising in the Third Circuit, the Circuit Court of Appeals held that the five-year limitation provided for in this section did protect the alien. *Hughes* v. *Tropello*, 296 Fed., 306.

In that case Tropello, an alien, arrived at New York, November 12, 1915, and after examination, an order of exclusion was made for his deportation charging that he was feeble-minded and likely to become a public charge. He was, however, permitted by the Secretary of Labor to enter the

United States upon giving a bond. Thereafter he and his mother resided in Philadelphia and continued to reside there when, on April 19, 1919, a warrant of arrest was issued by the Department of Labor and he was taken into custody on the ground that he was in the United States in violation of the Immigration Act of 1917; that he was feeble-minded at the time of his entry, and that he was likely to become a public charge. His deportation was finally ordered on April 5, 1923. A period of over three years elapsed between the time of his admission, under bond, and the time of his being taken into custody again, and a period of more than eight years elapsed before he was ordered to be deported. Thompson, District Judge, speaking for the Circuit Court of Appeals said at pages 308, 309:

> "It would seem clear that where the right of exclusion exists, but the right is waived by the department for any reason, and the alien is allowed to enter the country, whatever the conditions imposed, the case at once is taken out of the procedure for exclusion, and is governed by the procedure relating to the expulsion and deportation of an alien found in the United States contrary to law. To this last-named class, the statute of limitation applies. Section 19 designates, both generally and particularly, the aliens in the United States who are subject to be taken into custody and deported, not only those who have entered, or are found in the country, in violation of that act, but in violation of any other law of the United States. This section does not undertake to prescribe the method of procedure, what hearing shall be had, if any, or before whom. The section is concerned only in designating the aliens who may be deported, and in fixing a time limit within which such deportation must be made. The effective words are:

> 'That at any time within five years after entry, any alien (specifying the various classes unlawfully entering or found in the United States), shall, upon a warrant of the Secretary of Labor, be taken into custody and deported.'
>
> *It must be clear that, inasmuch as this section embraces every possible case where deportation can be had, the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein; and we find such exception embracing a large number of cases in section 19.*
>
> To better understand the meaning and effect of certain words in section 20 (section 1289¼k), which have caused some conflict of opinion as to the five-year limitation, it becomes necessary to keep in mind that section 19 is dealing with two classes of aliens, whose status before the law is entirely different, but who together constitute all the deportable cases. The first class embraces those who had no right to enter the country, who were not admissible under the law, who ought to have been excluded but who have entered the country, or are found therein, in violation of the law. The status of all this class is fixed, unalterably, as of the date of arrival at port. The second class embraces those whose admission into the United States was lawful, against whose status at that time, physically, mentally, or morally, the law could raise no objection, but whose subsequent conduct was such as to forfeit their right, under the law, to remain. The status of this class is fixed not as of the date of arrival, but as of the date when the offense was committed, or the conditions were found to exist, which forfeited their right of residence."

As was further pointed out in that case Section 19 can be harmoniously interpreted with Section 20 on the basis of the distinction between the

two classes of cases provided for. As to that class of aliens who may be deported immediately upon reaching this country, who are members of the classes enumerated in Section 3, or who shall have entered or *shall be found* in the United States in violation of the laws of the United States, Section 20 provides one method of defraying the expenses of deportation. On the other hand a different method of paying these expenses is provided by Section 20 "if deportation proceedings are instituted later than five years after entry of the alien, or, if the deportation is made by reason of cases arising subsequent to entry." Reverting to Section 19, the classes of aliens who may be deported five years after entry are specifically enumerated, such as aliens who at any time after entry" shall be found advocating or teaching the unlawful destruction of property, or the overthrow, by force or violence, of the Government of the United States, or the assassination of public officials, or aliens who shall be sentenced more than once to a term of imprisonment because of conviction in this country of crimes involving moral turpitude "committed at any time after entry."

In *United States ex rel. Patton* v. *Tod, supra,* the Court failed to recognize this distinction and differentiated its earlier decision in *United States ex rel. David* v. *Tod,* 289 Fed., 60, on the ground that Sections 20 and 21 of the Act of 1907 had no provision similar to that of Section 20 of the Act of 1917 to the effect that "if deportation proceedings are *instituted* at any time within five years after the entry of the alien," etc. Here, however, no proceedings were even "instituted" within the period of five years.

VIII.

More than five years having elapsed between appellant's release from Ellis Island and the time of her father's naturalization, she was within the protection of Section 19 of the Immigration Act of February 5, 1917, at the time of his naturalization, and she was therefore dwelling and permanently residing within the United States.

IX.

In both aspects of this case the fact that these proceedings were begun by "Secretary's warrant" as late as on March 18, 1922, after the naturalization proceedings, the exclusion proceedings must be regarded as abated, with the consequence that the appellant must be deemed to have dwelt or resided in the United States at the time of her father's naturalization, and that in any event these deportation proceedings were barred.

Whatever may have occurred at the time when Esther Kaplan arrived in this country and down to the time when she left Ellis Island to take up her abode with her parents, the record clearly shows that the proceedings for her deportation were "warrant proceedings" instituted by the Secretary of Labor on March 18, 1922, when she was taken into custody, and thereafter was medically examined and accorded a hearing, all cul-

minating in a warrant of deportation signed on January 19, 1923, by Robe Carl White, Second Assistant Secretary of Labor (*Rec.*, pp. 12-40).

In legal effect, these "warrant proceedings" were based on the theory that the alien had entered the United States, and that the earlier proceedings upon her arrival in the United States looking to her exclusion had necessarily abated. (See *Billings v. Sitner,* 228 Fed. Rep., 215, Circuit Court of Appeals, First Circuit.) Consequently if the time which had elapsed between the date when Esther Kaplan left Ellis Island and the date when she was arrested in the warrant proceedings exceeded three years (if the Immigration Act of 1907 is applicable), or five years (if the rule of limitation laid down in the Act of 1917 controls), the right to deport her was barred.

For the same reason also, whether Section 2172 of the Revised Statutes controls, or the Act of March 2, 1907, has superseded it, Esther Kaplan, at the time of her father's naturalization, must be regarded as dwelling in the United States or as permanently residing there. She therefore became a citizen at the very moment when her father became naturalized.

X.

It is respectfully submitted that the order of the District Court should be reversed, and the Writ of Habeas Corpus allowed.

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924

ESTHER KAPLAN, APPELLANT

v.

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, Ellis Island, Port of New York

No. 241

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF FACTS

The appellant is seeking relief by habeas corpus from an order of deportation issued by the immigration authorities. A writ of habeas corpus sued out on her behalf was dismissed without opinion by the District Court. From the order of dismissal she has appealed direct to this court. The printed record is unusually complicated and badly arranged; and in order that the case may be understood, its history must be briefly reviewed.

The appellant is a native of the province of Podolie, formerly in Russia, and now in the Ukraine. She came to the United States with her mother and two brothers, arriving at Ellis Island on July

20, 1914. The father had preceded them, and was already in this country. At the time of her arrival, the appellant was about thirteen years old, having been born in 1901 or 1902. On arrival, she was certified as feeble-minded. (Rec. Tr. p. 33.) The correctness of the certificate is not disputed; and it has been twice affirmed. (Rec. Tr. pp. 15, 35.) She was accordingly ordered to be excluded; and as she was found to be helpless by reason of her age and mental condition, her mother was also ordered excluded as an accompanying alien. (Rec. Tr. pp. 33-34.)

Before this order could be carried into effect, the European War had begun; and in view of the dangerous conditions which had thereby arisen, the immigration authorities suspended the execution of deportation generally. One of the appellant's two brothers was admitted unconditionally. (Rec. Tr. p. 59.) Her mother, and the other brother, were admitted under a public-charge bond, which bore an added condition that they should depart with the appellant whenever the latter's deportation could be effected. (Rec. Tr. pp. 47-48.) The appellant herself was detained at Ellis Island for nearly a year—until June, 1915. The Hebrew Sheltering and Immigrant Aid Society then applied for her temporary admission "on a bond guaranteeing that she will return to her native country, Russia, when deportation thereto with safety and without hardship could be effected." (Rec. Tr. p. 43.) After some corre-

spondence, she was released on June 18th, 1915, in custody of the society, which agreed to accept her "until she can be safely deported, to return her when required, and meanwhile prevent her from becoming a public charge." (Rec. Tr. pp. 24-25, 42.)

Thereupon the appellant joined her family in New York City, and has been living with them ever since. (Rec. Tr. p. 21.) On December 14, 1920, *her father became a citizen.* (Rec. Tr. pp. 6, 40.) The appellant at that date was about eighteen years old.

In February, 1922, the appellant's case came again to the notice of the authorities; and she was reexamined by the Public Health surgeons, who found her still feeble-minded. (Rec. Tr. p. 35.) On March 17, 1922, a warrant was issued for her arrest. (Rec. Tr. p. 23.) She was again examined by the surgeons on October 28, 1922, and was again certified as feeble-minded. (Rec. Tr. p. 15.) She was then brought before an immigration inspector at Ellis Island; and on December 5, 1922, she was given a full hearing, her own counsel being present, and witnesses being called. The inspector recommended deportation. (Rec. Tr. pp. 17–23.)

Following this recommendation, the Assistant Secretary of Labor, on January 19, 1923, ordered her to be deported. (Rec. Tr. p. 13.) A writ of habeas corpus was thereupon sued out; and after a hearing, the District Court dismissed the writ, without giving an opinion.

From the order of dismissal she has appealed direct to this Court, alleging a violation of her constitutional rights. It is the appellant's contention that the naturalization of her father during her minority has operated to confer citizenship upon her, and thereby to divest the jurisdiction of the immigration authorities. It is further argued on her behalf that her deportation cannot now be effected in any event, since the period mentioned in the Immigration Acts of 1910 and 1917 has already elapsed.

ARGUMENT

I

In the first place, it is submitted that this case is not one which can properly be brought to this Court on direct appeal, and that this Court should therefore transfer the case to the Circuit Court of Appeals.

Section 238 of the Judicial Code permits a direct appeal from the District Court " in any case that involves the construction or application of the Constitution of the United States." In this case the appellant advances a claim of citizenship, based upon the construction of certain statutes of the United States. Obviously this is not a construction of the Constitution. It is a construction of the statutes only. And since that is the case, the appellant can not now be heard in this Court.

United States ex rel. Mensevich v. *Tod,* 264 U. S. 134;

Chin Fong v. *Backus,* 241 U. S. 1.

The claim of citizenship has been raised in other cases, and the Courts have held that the claimant is entitled to a judicial determination of that question. But that does not mean that the question is one which warrants a direct appeal to this Court. Where the claim of citizenship is based upon the construction of statutes, the appeal should go to the Circuit Court of Appeals.

Ng Fung Ho vs. *White*, 259 U. S. 276,
United States ex rel. Patton vs. *Tod*, 297 Fed. 385,
United States ex rel. Sejnensky vs. *Tod*, 285 Fed. 523.

It is therefore submitted that this Court should not hear the present appeal, but should transfer the case under Section 238–a of the Judicial Code to the Circuit Court of Appeals for the Second Circuit.

II

Should this Court decide, however, that it has jurisdiction to hear the appeal, it is submitted that the decision must be against the appellant.

At the outset, it must be remembered that the appellant is undoubtedly feeble-minded now, and was undoubtedly feeble-minded when she arrived at Ellis Island. On this point there is no dispute, and the three medical certificates are conclusive. (Rec. Tr. pp. 15, 33, 35.)

With respect to feeble-minded aliens, the statute is mandatory. They must be excluded; and there is no authority in the Secretary of Labor, or in

anyone else, to admit them. A sharp distinction is drawn under the Immigration Acts of 1907 and 1917 alike between (1) aliens who are feeble-minded or who suffer from loathsome diseases on the one hand, and (2) aliens who suffer from minor physical ailments affecting their capacity to earn a living. With respect to this second class the Secretary has discretionary powers, and he may admit them, in certain cases, under bond. With respect to the first class he has no discretion whatever. The medical certificate is final; and exclusion is compulsory.

The following sections of the Immigration Acts control this point:

Immigration Act, 1907 (34 Stat. L. 898):

> S. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous. * * *
>
> (The latter part of this section was amended by the Act of March 26, 1910 (36 Stat. L. 263); but the words just quoted were not affected.)
>
> S. 10. That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within

any of the classes excluded from admission to the United States under section two of this Act.

S. 25. * * * "*Provided,* That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; *but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act.*"

Immigration Act, 1917 (39 Stat. L. 874):

S. 3. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously. * * *

S. 17. * * * *Provided,* That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act.

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> S. 21. That any alien liable to be excluded because likely to become a public charge or because of *physical* disability other than tuberculosis in any form or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Labor upon the giving of a suitable and proper bond or undertaking. * * *

In this case the appellant arrived at Ellis Island while the Act of 1907 was in force; but she was still in this country, and the present deportation proceedings were begun, after the Act of 1917 had gone into effect. It matters not, however, whether we apply the Act of 1907 of the Act of 1917 to her case. Both Acts alike mandatorily bar the door to feeble-minded persons; and under both acts the Secretary has no discretion to admit them.

The reason for the distinction between feeble-minded aliens and aliens likely to become a public charge is given in the Report of the Senate Committee which accompanied the Act of 1917:

> On page 5, line 1, the words " mental or," appearing before the word " physical," were stricken out of H. R. 6060, the object being to make the factor that determines rejection of the mentally defective the mere existence of the defect, not, as with the physically defective, the question whether the defect affects earning capacity. The reasons for excluding a physically defective alien are likelihood of his becoming a public charge and inability by his own exertions to

> care for himself and those dependent upon him, while the real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity. This change was made only after consultation with persons of knowledge and experience, and is in line with the well-established public policy of rigidly excluding the mentally deficient.
>
> Senate Rep. No. 352, 64th Congress, 1st session, p. 5. (*Cf. United States ex rel. Patton* v. *Tod.*, 297 Fed. 385, 395.)

III

Under the Act of 1907, the Secretary had no authority to admit insane or feeble-minded persons under any conditions whatever, even for a temporary stay (except that under s. 19, he might, on surgeon's certificate, order urgent cases to be held for medical treatment where immediate deportation would endanger the alien's health).

With the law in this condition, the Secretary was confronted with the problems arising out of the sudden outbreak of the European War. The immigration authorities were burdened with the presence of great numbers of aliens (including the present appellant), whose admission was forbidden by strict law, but whose deportation was forbidden by common humanity. They were faced with the choice of admitting the aliens temporarily

in defiance of the law, or of ordering them to be returned through dangerous seas to their homes in the war zone. Under the circumstances, it is not surprising that their decision took the course dictated by humanity. But it must be repeated that it was not the course prescribed by the law. In releasing the appellant under the provisional agreement made in June, 1915 (Rec. Tr. pp. 24–25, 42), the Secretary of Labor acted contrary to the express terms of the statute. His action was justified by the overwhelming emergency which confronted him. That is now long past. The appellant cannot invoke the past emergency, under which she was temporarily released, to establish her right to remain here permanently contrary to the Act. Under the law, she should have been excluded as soon as she arrived. That she was not so excluded is imputable solely to *vis major*. *Vis major* having now ceased to operate, the law must take its course.

IV

It is clear, then, that the appellant in 1914 was an alien of a class which is mandatorily excluded from this country. She is still of that class; and if she is still an alien, the immigration authorities have jurisdiction to deport her.

But is is contended that the situation has been radically altered by the naturalization of the appellant's father in 1920. It is undisputed that this naturalization took place while the appellant was still a minor; and it is argued that the appellant has therefore become a citizen of the United States,

over whom the immigration officials have no jurisdiction, and whom they cannot, under any circumstances, exclude or deport. It is upon this ground that the appellant has brought her case direct to this Court.

It is submitted that this contention cannot be supported, and that under the law, the appellant has not become an American citizen. The statutes involved are these:

> R. S. s. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, *if dwelling in the United States*, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. * * *

Act of March 2, 1907 (34 Stat. L. 1228):

> S. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization or resumption of American citizenship by the parent: *Provided*, that such naturalization or resumption takes place during the minority of such child: *And provided further, that the citi-*

zenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

On behalf of the respondent it is submitted that the appellant in this case has never "dwelt within the United States," and that she has never "begun to reside permanently in the United States." She can not, therefore, be considered as having been naturalized with her father, under either of the above statutes.

The phrase "if dwelling in the United States" in R. S. 2172 is derived from s. 4 of the Act of April 14, 1802. (Ch. 28, 2 Stat. L. 153.) It is an ambiguous phrase; and from the first, there were grave doubts whether the minor was required to be dwelling in the United States at the time the parent was naturalized, or whether it was sufficient for him to come to the United States after that time. The Act was frequently before the courts on this point, *Campbell* v. *Gordon,* 6 Cr. 176; *Young* v. *Peck,* 21 Wend. (N. Y.) 389, affirmed on appeal, 26 Wend. 612. Appeal taken to this Court but dismissed, the parties having reached a settlement. 1 How. 250. Cf. also *State* v. *Penney,* 10 Ark. 621; *O'Connor* v. *State,* 9 Fla. 215.

It seems never to have been doubted, however, that the minor must be *legally* dwelling at *some* time within the United States; and the necessity for a *legal* presence is made more clear by the language of the Act of 1907, above mentioned. (34 Stat. L. 1228.)

This Act was drafted to clear away the doubts which had arisen with respect to the earlier provision. See House Documents, 59th Congress, 2nd Session, Vol. 72–326 at p. 138–142. It is not certain whether the provisions of R. S. 2172 have been impliedly repealed by the Act of 1907; but there is no need to press this point. It matters not whether we treat the Act of 1907 as repealing or as explaining the doubtful language of R. S. 2172. In either event, the language of the Act of 1907 is clear. And since it is the latest utterance of the legislature, effect must be given to it.

The question, then, is this: Has the appellant at any time *begun to reside permanently* in the United States? Or, under the older statute (which, the Government submits, expresses the same idea, though in language which is not so clear) has she ever *dwelt* within the United States? If she has not, she is still an alien, and must be deported.

It has already been shown (points I and II, supra) that the appellant, at the time of her arrival here, was an alien of a class that is not permitted, under any circumstances, to enter this country. Her admission (if it can be called such) was of a temporary nature, and was granted contrary to law because of a particular emergency which has now ceased to operate.

But it is also clear that the appellant was not, in the proper sense, "*admitted*" at all. She was detained at Ellis Island with a view to deportation as soon as that was practicable. After she had

been so detained for nearly a year, it was apparent that the war was still continuing and was likely to continue for an indefinite time, rendering the time of ultimate deportation "problematical." (Rec. Tr. p. 57.) Under these circumstances, the Hebrew Sheltering and Immigrant Aid Society on June 9, 1915, applied—

> for the temporary admission of the above named alien on a bond guaranteeing that she will return to her native country, Russia, when deportation thereto with safety and without hardship could be effected. (Rec. Tr. p. 43.)

The Commissioner General of Immigration replied:

> If the Hebrew Sheltering and Immigrant Aid Society will stipulate to become custodian of the child until she can be safely deported, to return her when required, and meanwhile to prevent her becoming a public charge, they will be appointed such custodian. (Rec. Tr. p. 25.)

The Society on June 18, 1915, agreed to accept her custody under these conditions. (Rec. Tr. p. 24.) She was then allowed to join her parents.

It will be seen that no permanent admission or release was ever contemplated; nor could it be contemplated, consistent with the law. In permitting the appellant to leave Ellis Island, the authorities were at least stretching the law to meet the practical exigencies of the war-time situation. But they never intended to release her permanently, or to allow her to set up a domicile in this country

in defiance of law. All parties understood that it was a temporary arrangement in the nature of a release on parole, effected by mutual consent, and that the law must take its course as soon as deportation became practicable. Under these circumstances it is clear that the appellant has never lawfully "*entered*" the United States, and that she has never "*begun to reside permanently*" within our borders. She cannot, therefore, have become a citizen.

In *Zartarian* v. *Billings*, 204 U. S. 170, this Court held that the minor daughter of a naturalized father must be excluded from the country because she was suffering from trachoma, and that in view of her being in a class which was mandatorily excluded, she could acquire no rights by reason of her father's naturalization. At page 175 the Court said:

> The right of aliens to acquire citizenship is purely statutory; and the petitioner's child having been born and remained abroad, clearly does not come within the terms of the statute. She was debarred from entering the United States by the action of the authorized officials, *and, never having legally landed, of course could not have dwelt within the United States.*

This case was decided under R. S. 2172, hence the use of the word "*dwelt.*" Under the Act of 1907 the decision is equally sound, for if the appellant has never "dwelt" within the United

States, she certainly has never " begun to reside permanently " within our borders.

The same doctrine is enunciated by the lower Federal Courts in several cases.

> *United States ex rel. Patton* v. *Tod* (C. C. A.), 297 Fed. 385;
>
> *United States ex rel. Goldman* v. *Tod*, D. C. (Northern District of N. Y.) 1923, not reported. A copy of this opinion is printed as an appendix to the present brief.
>
> *In re Camaras*, 202 Fed. 1019;
>
> *United States ex rel. De Rienzo* v. *Rodgers* (C. C. A.), 185 Fed. 334.

In *United States ex rel. Goldman* v. *Tod, supra,* the Court was confronted with a claim of citizenship precisely similar to that advanced by the present appellant. The Court answered:

> Does the fact that officers of the Immigration Service and the Department of Labor have been indulgent in not deporting the defective minor alien at once, but have permitted him to go to his father under deportation bond, make him an exception, and give him admission, or make his entry lawful? Can the mere manner of enforcement, or even nonenforcement, by the enforcing officers, change the law, or the status of those coming within its provision? Do the acts or indulgences of the enforcement officers of the Immigration Bureau or Department of Labor waive the application of the status as to this alien, or estop the Government from enforcing its laws, and deporting him? Manifestly not. Such has never been held. * * *

> How, then, can an alien be said to have lawfully entered the country so that he may "dwell" therein, until he has been admitted pursuant to its Immigration Laws?
>
> The defective minor alien can, therefore, no more "dwell" in this country under Section 2172 of the Revised Statutes since the enactment of the provisions of the Immigration Law prohibiting his entrance, than he can "begin to reside permanently" in this country under Section 3 of the Act of March 2, 1907.
>
> The principle is the same under both statutes. Until admitted in conformity with the Immigration Law, he can acquire no rights of citizenship under either statute.

In *United States ex rel. De Rienzo* v. *Rodgers* (*supra*) the same contention was advanced; and the Court said:

> Under the Act of March 2, 1907, citizenship is only conferred upon the minor child of a naturalized parent when (or if) he has begun to reside permanently in the United States. Until then, he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry into the country by the act to regulate the immigration of aliens into the United States. The language of Mr. Justice Day (in *Zartarian* v. *Billings*), in regard to the law then under discussion, may be applied with little change to the situation under section 5 of the Act of 1907, and it is still true that Congress has never said that an alien child, who has never begun to reside permanently in the

> United States, coming to join a naturalized parent, may land, when an idiot, or otherwise belonging to the excluded classes. (185 Fed. 334, 338.)

This Court has repeatedly held that there is no "entry" where an alien is temporarily released under bond or in custody of a third person or a society.

> It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But, on the question whether he is wrongly imprisoned, we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will. *Chin Yow* v. *United States,* 208 U. S. 8, 11.

In *Zartarian* v. *Billings* (supra) the Court referred with approval to *Nishimura Ekiu* v. *United States,* 142 U. S. 651. In that case the petitioner was placed, by consent of counsel, in the custody of the Methodist Episcopal Japanese and Chinese Mission, pending the final decision of her case. The Court said:

> Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and keeping her there by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of habeas corpus, left her in the same position, so far as regarded her right to land in the United

> States, as if she never had been removed from the steamship. (142 U. S. 651, 661.)

In *United States* v. *Ju Toy,* 198 U. S. 253, 263, it was said:

> The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate.

In the present case there are additional reasons indicated above why this appellant should not be considered as having lawfully *entered* the United States. She was of a class whom the immigration officials could not lawfully permit to enter in any event. Her release was a temporary expedient, and was so understood by all parties. The immigration authorities clearly intended to retain the ultimate control over her, and stipulated that she should be surrendered whenever deportation became practicable. She has never been, and can not be, lawfully admitted without restriction to this country. She can not, therefore, *begin to reside here permanently;* and so she is ineligible for citizenship under her father's certificate of naturalization.

Zartarian v. *Billings* (*supra*) 204 U. S. 170;

United States ex rel. Goldman v. *Tod,* unreported (*supra*) (see Appendix);

United States ex rel. De Rienzo v. *Rodgers,* 185 Fed. 334;

United States ex rel. Abdoo v. *Williams,* 132 Fed. 894.

V

But it may be said that the appellant is named in the naturalization certificate of her father (Rec. Tr. p. 40) and that the Government is therefore estopped to deny her citizenship.

To this contention a short answer may be made. The mention of the appellant's name is a statutory formality, and is in reality only a declaration by the alien parent himself. The United States is not estopped thereby, and may disprove the appellant's claim of citizenship by collateral, as well as by direct attack. *United States ex rel. Goldman* v. *Tod,* unreported (*supra*).

VI

The case of *United States ex rel. Sejnensky* v. *Tod,* 285 Fed. 523, is relied upon by the appellant. In that case a feeble-minded alien woman, held for deportation, was released on bond temporarily, to visit her relatives. While so released, she married an American citizen, and it was held that by marriage she became a citizen, and that the immigration officials lost their power to deport her.

This case is easily distinguishable from the one at bar. At the time of the marriage in the Sejnensky case, an alien woman, under R. S. 1994, became a citizen *automatically,* upon her marriage to a citizen, whether married abroad or in this country. There was at that time *no residence qualification* for the citizenship of such married woman.

In the case of minors, however, there is an additional requirement. Before their parents' natu-

ralization can affect them, they must "*dwell*" here (R. S. 2172) or "*begin permanently to reside*" here. (Act of 1907, 34 Stat. L. 1228.) Neither of these requirements was exacted of the alien woman who married a citizen prior to the repealing act of September 22, 1922. (42 Stat. L. 1021.) And in the Sejnensky case, the marriage took place in 1921.

It is on this ground that the Sejnensky case has been distinguished in the lower Federal courts and it is submitted that the distinction is sound. *United States ex rel. Patton* v. *Tod*, 292 Fed. 243, 246.

VII

But it is argued that the statute of limitations has run, and that the Secretary cannot deport the appellant, inasmuch as more than five years have elapsed since her arrival at Ellis Island.

On the theory already advanced by the Government, this contention of the appellant cannot be supported. Under S. 19 of the Immigration Act of 1917 (39 Stat. L. 874) deportation proceedings in feeble-minded cases must be commenced within five years after entry. The statute does not begin to run until the date of entry. And the appellant has never "*entered.*"

"Entry" is something more than mere physical presence within our boundaries. It is essential to a lawful entry that the alien shall have been examined and passed upon by the immigration authorities. His release must be upon a permanent footing, and a temporary arrangement such as was

adopted in this case does not constitute a permanent abandonment of control by the immigration authorities. In strict logic, the case should be classified as an " exclusion " and not as a " deportation " case. The law required, and the officials intended, from the day that this alien arrived, that she should not be ultimately permitted to go at large in this country; and her exclusion (understood by all parties to be inevitable) has been merely postponed.

The appellant arrived at Ellis Island on July 20, 1914. She was confined there until June 18, 1915. She was then released in custody of the Hebrew Sheltering and Immigrant Aid Society, with the understanding that she should be ultimately returned to Europe. The warrant for her arrest was issued on March 17, 1922. If the statute began to run at all, it might be argued that it began to run only at the close of the war, when deportation became practicable. But under the circumstances, it is submitted that it never began to run. The appellant was never admitted freely to come and go as she pleased. She was always in the custody (constructive, if not actual) of the Hebrew Sheltering and Immigrant Aid Society, and her status has not been changed since her arrival.

Chin Yow v. *United States,* 208 U. S. 8, 11;
United States v. *Ju Toy,* 198 U. S. 253;
Nishimura Ekiu v. *United States,* 142 U. S. 651, 661.

VIII

The Government freely concedes that this is a case of great hardship, and that the appellant, if deported, will be separated from her parents and from what she has doubtless been led to believe would be her home. At the same time, it is submitted that these considerations are for Congress, and not for the Courts. Under the law, this alien is, and always has been, of a class which Congress has declared must be excluded. This has been understood by all parties at all stages of the case. If, in view of the hardships involved in this and similar cases, Congress should decide to grant admission, it may do so. But in the absence of such new legislation, neither the immigration officials nor the Courts have any discretion.

Commissioner of Immigration v. *Gottlieb*, 265 U. S. 310.
Chung Fook v. *White*, 264 U. S. 443.

It is, therefore, respectfully submitted that the appeal be dismissed. Or if, as indicated in point I above, this Court should be of opinion that the appeal should properly have been taken to the Circuit Court of Appeals, an order of transfer should be made.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.

JANUARY, 1925.

Appendix

Opinion of the Honorable Frank Cooper, United States District Judge for the Northern District of New York, in the case of *United States ex rel. Goldman* v. *Tod* (opinion not yet reported), filed during the fall of 1923 in the United States District Court for the Northern District of New York.

United States District Court, Northern District of New York. *United States of America ex rel. Samuel Goldman, relator,* v. *Robert E. Tod, Commissioner of Immigration at the Port of New York, and Edward Zacker, immigrant inspector, respondents.*

Ralph Shulman, Esq., Attorney for Relator, Syracuse, N. Y. (Louis Marshall, of New York City, of Counsel) (Lewis M. King, of Schenectady, N. Y., of Counsel).

Hon. Oliver D. Burden, U. S. Attorney, Attorney for Respondents, Syracuse, N. Y.

Cooper, J.:

This is a Habeas Corpus proceeding. A writ was issued out of this Court on behalf of the relator, Samuel Goldman, a minor, to the Respondent, the Commissioner of Immigration, for the Port of New York, to test the validity of the detention of the relator, who was taken by the Commissioner upon a warrant for his deportation issued by the Department of Labor under the Immigration Law.

The facts generally are undisputed, and are as follows:

The relator, Samuel Goldman, was born in Ukrania, Russia, on August 20, 1908. The family thereafter moved to Rumania. He came to the

United States at the age of thirteen, arriving on the Steamship *Megantic*, at the Port of New York, on January 21, 1921, accompanied by his mother and two sisters, and was classed as a Rumanian. At Ellis Island he was examined by Medical Officers of the Public Health Service, who found him feeble-minded and on their certificate the Board of Special Inquiry pronounced him to be feeble-minded, and not admissible under Section 3 of the Immigration Law. An appeal was taken to the Secretary of Labor, and the relator was permitted to enter the United States temporarily under a public charge and departure bond, which was executed March 8, 1921, and which stipulated that the alien would depart from the United States at the expiration of one year, without expense to the United States. Thereupon he proceeded to Syracuse, where his father lived, and has lived there with his father ever since, entering one of the public schools in March, 1921, in the grade of children six to seven years of age, and, except for the periods of time that he came down to Ellis Island for further medical examination, or during vacations, he has been in regular attendance at the school.

The relator appealed to the Board of Medical Officers of the Public Health Service and was given further medical examination on February 28, 1922, April 27, 1922, and April 2, 1923, and the original finding of feeble-mindedness was affirmed in each instance.

On March 7, 1922, the Department directed that the relator be deported, but the bond granting temporary admission was extended on May 15, 1922, then to January 1, 1923, and later for a further period of three months.

On April 21, 1923, the Department of Labor directed that the bondsmen be called upon to effect departure, as stipulated in the bond, failing which, warrant of arrest would issue. The relator alien failed to depart and warrant of arrest was issued May 9th, 1923, and was served on May 14, 1923, whereupon the Court on relator's petition, issued the Writ now before the Court.

On November 25, 1922, Isadore Goldman, the father of the relator, was naturalized, and a certificate of citizenship was issued to him by the Supreme Court of the State of New York, in Onondaga County.

Section 3 of the Immigration Law, under which the relator was held for deportation, reads as follows:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics * * *.

The relator contends that under Section 2172 of the Revised Statutes he became a citizen upon the Naturalization of his father, November 25, 1922, being then " dwelling " in this country, and can not be deported.

The Government contends that Section 2172 of the Revised Statutes has been superseded by Section 5 of the Act of March 2, 1907 (34 Stat. L. 1229), and that the latter section is applicable.

The Government further contends, that whichever section is applicable, the relator did not become a citizen upon the naturalization of his parent, because he did not "begin to reside permanently " in the United States within the meaning of Section 2172, at, before, or after the naturalization

of his father, or at any time, because not entitled to so legally "reside" or "dwell."

It is not denied by the Government that if the relator is a citizen, he cannot be deported.

The first question, then, is whether or not the relator is a citizen within the meaning of whichever of these statutes is applicable.

The statutes referred to are, as follows:

Section 2172 of the Revised Statutes:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if *dwelling* in the United States, be considered as citizens thereof * * *.

Section 5 of the Act of March 2, 1907 (34 Stat. L. 1229):

> That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American Citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And Provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States (34 Stat. L. 1229).

Section 2172 of the Revised Statutes, was enacted in 1802, as part of the Naturalization Law of the United States, and was a codification or re-enactment of Acts of March 1, 1790 (1 Stat. L. 103),

and January 29, 1795 (1 Stat. L. 414). This section has never been expressly repealed or amended by any subsequent act, though the general Naturalization Law has been amended and codified since 1802. The next important Act relating to alien minors in connection with citizenship, was the Act of March 2, 1907 (34 Stat. L. 1220), Section 5 of which appears above. There has been no important change of statute with respect to the citizenship of minor aliens since 1907.

Although the Act of March 2, 1907, is entitled "An Act in Reference to the Expatriation of Citizens and Their Protection Abroad," it has been held on good authority, that Section 5 thereof, above set forth, has been since March 2, 1907, been the law applicable to minor aliens coming to this country, and claiming citizenship because of the naturalization of the parent. This was held by the Circuit Court of Appeals in the Third Circuit, in the case of *United States ex rel. De Ricuzo* vs. *Rodgers*, 185 Fed., 334. It is there held that Sec. 5 of the Act of March 2, 1907, though not in the form of an amendment or repealing Act, was passed for the purpose of removing the ambiguity in the word "dwelling" in Section 2172, the language being changed in Section 5 of the Act of March 2, 1907, to read:

> The citizenship of such minor child shall begin at the time such minor child *begins to reside permanently* in the United States.

See also the well-considered opinion of Winslow, D. J., in the *United States ex rel. Patton* vs. *Tod* (decided July 6, 1923), and not yet reported [now reported in 292 Fed. 243]:

> The provisions of the first clause of Section 2172 in so far as they apply to the children of aliens born *outside* the United States are superseded by the Act of March 2, 1907, Sec. 5 (*supra*).

No case has been cited by the relator and none has been found holding that since the Act of March 2, 1907, Section 2172 has any application to minor aliens born outside of the United States coming to the United States and claiming citizenship by naturalization of the parent.

True the title to the Act of March 2, 1907, does not relate to the status or citizenship of minor aliens entering the country. But the title will not be controlling, since the language admits of no doubt that it is intended to apply to alien minors coming to the United States.

"The '*naturalization or resumption* of American citizenship by the parent,' and the minor alien's 'beginning to reside permanently in the United States' can only take place within the country." Manifestly, this language can have no application to protection abroad or status abroad. Two statutes covering the same subject can not both apply. The later one must prevail.

Relator must, therefore, fail if his claim of citizenship is based on the contention that Section 2172 of the Revised Statutes is the law applicable, and not Section 5 of the Act of March 2, 1907.

But if it be conceded that Section 2172 of the Revised Statutes is the law governing the citizenship of minor aliens, based on the naturalization of the father, the relator must, nevertheless, fail.

The relator asks the Court to hold that this defective minor alien, who was in the country only

under bond for departure, was " dwelling " in the United States within the meaning of Sec. 2172 of the Revised Statutes when his father became a citizen, and that he thereby became a citizen upon the naturalization of his father.

To hold this is to hold that a defective minor alien, unfit under one statute (Immigration Law) to *lawfully* enter the United States, is nevertheless under another statute (Section 2172 R. S.) made a citizen, with all the rights pertaining to citizenship, including the right to be and reside permanently where he will in the United States, and the right, if it be a right, to public support if unable to support himself.

Such construction is contrary to reason. By such construction the Immigration Law is nullified, so far as defective minor aliens are concerned.

But the relator, to evade being placed in such position, insists that he is without the scope of and beyond the prohibition of Section 3 of the Immigration Law, because he did physically enter the country and did *dwell* in the flesh here with his parents, at the naturalization of his father, and has done so since about January 21, 1921, and is, therefore, subject only to the Naturalization Law.

Prior to the time that there was any restriction upon immigration into this country no such question could arise as to the application of the Naturalization Law. It applied to all immigrants not disqualified for citizenship by the Constitution.

After the enactment of the Immigration Law, the Naturalization Law could apply only to those who could lawfully enter under the Immigration Law. Until the alien was found lawfully qualified to enter under the Immigration Law, and did enter

after such determination, he was subject to its provisions. Upon lawfully entering, he was no longer subject to its provisions, as far as citizenship is concerned, but passed under those of the Naturalization Law.

That the relator did not lawfully enter the country in conformity with its laws, so as to pass from the restriction of the Immigration Laws to the rights of the Naturalization Law, under either section contended for, is established by abundant authority.

U. S. ex rel. DeRienzo vs. *Rodgers,* 185 Fed. 334;
U. S. ex rel. John Abdoo vs. *Williams,* 132 Fed. 894;
In re Gayde, 113 Fed. 588;
Chin Yow vs. *U. S.* 208 U. S. 8;
Zartarian vs. *Billings,* 204 U. S. 170;
U. S. ex rel. Pola Patton vs. *Tod* (297 Fed. 385);
Nishimura Ekiu vs. *U. S.* 142 U. S. 651
U. S. vs. *Ju Toy,* 198 U. S. 253;
In re Camaras, 202 Fed. 1019.

Some of these cases were decided before, and some after the enactment of Section 5 of the Act of March 2, 1907.

It is true that in most of these cases the alien never left the actual physical custody of the Immigration Authorities. But in the case of *U. S. ex rel. Pola Patton* vs. *Tod* (*supra,* not yet reported), the alien resided with her parents in this country, from 1914 to 1923, under bonds of departure, and under circumstances very similar to the case at bar; *In re Camaras,* 202 Fed. 1019, the alien was temporarily admitted under bond of departure, and in the *Nishimura Ekiu* vs. *U. S. case,*

the alien resided in the Methodist Episcopal Immigrant Home out of actual custody, pending a final disposition of the writ.

It seems, however, unimportant whether the alien was in the actual custody of the Immigration Authorities at the boundary line, or was within its boundaries in the constructive custody of the authorities under a bond requiring the alien to be surrendered for deportation, as in the Patton case, and in the case at bar. The foregoing cases all hold in substance, that until the alien has been admitted in conformity to the Immigration Law, the alien can not be said to have lawfully entered, dwelt, or resided within the country.

In *Nishimura Ekiu* vs. *United States* (*supra*), the Court said:

> Putting her in the mission house, as a more suitable place than the steamship * * * left her in the same position, so far as regarded her right to land in the United States, as if she had never been removed from the steamship.

In *Chin Yow* vs. *United States* (*supra*), Mr. Justice Holmes, delivering the opinion of the Court, said:

> It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. De facto he is locked up until carried out of the country against his will.

In *U. S. ex rel. Abdoo* vs. *Williams* (*supra*), Judge Lacombe said:

> It has been repeatedly held that the mere being at Ellis Island in the custody of the Immigration Authorities, is not a landing

within the meaning of any provision of the Revised Statutes and no landing has been effected until the immigrant has been *passed* by the authorities at Ellis Island.

In *U. S.* vs. *Ju Toy* (*supra*), the Court said:

> The petitioner, although physically within our boundaries, is to be regarded as stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate.

In *U. S.* vs. *Wong Kim Ark*, 169 U. S. 649, 686, Mr. Justice Gray, delivering the opinion, said:

> The Naturalization Acts of the United States have been careful to limit admission to citizenship to those "within the limits, and under the jurisdiction of the United States."

In *Zartarian* vs. *Billings*, 204 U. S. 170, the Court said of an alien:

> Never having legally landed, of course he could not have dwelt within the United States.

In *U. S. ex rel. De Rienzo* vs. *Rodgers* (*supra*), the Court said:

> Under the Act of March 2, 1907, citizenship is not only conferred upon the minor child of a naturalized alien when (or if) he has begun to reside permanently in the United States. Until then he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry into the country by the Act to regulate the immigration into the United States
>
> The language of Mr. Justice Day (*Zartarian* vs. *Billings*, 204 U. S. 170), in regard to the law then under discussion (Sec. 2172 of Rev. Stat.), may be applied with litle change

> to the situation under Section 5 of the Act of 1907, and it is still true that Congress has never said that an alien child, who has never begun to reside permanently in the United States, coming to join a naturalized parent, may land, when an idiot, or otherwise belongs to the excluded class.

Does the fact that officers of the Immigration Service and of the Department of Labor have been indulgent in not deporting the defective minor alien at once, but have permited him to go to his father under deportation bond, make him an exception, and give him admission, or make his entry lawful? Can the mere manner of enforcement, or even nonenforcement, by the enforcing officers, change the law, or the status of those coming within its provision? Do the acts or indulgences of the enforcement officers of the Immigration Bureau of Department of Labor waive the application of the statutes as to this alien, or estop the Government from enforcing its laws, and deporting him? Manifestly not. Such has never been held. It would not be so, even if there were no such provision in the Immigration Law, as there is, viz: Section 17. This section reads in part, as follows:

> Provided that the decision of a Board of Special Inquiry shall be based upon the certificate of the examining medical officer * * * and shall be final as to the rejection of aliens affected with any mental or physical disability, which would bring such aliens * * * under Section 3 of this Act.

How, then, can an alien be said to have lawfully entered the country so that he may "dwell" therein, until he has been admitted pursuant to its Immigration Laws?

The defective minor alien can, therefore, no more "dwell" in this country under Section 2172 of the Revised Statutes since the enactment of the provisions of the Immigration Law prohibiting his entrance, than he can "begin to reside permanently" in this country under Section 3 of the Act of March 2, 1907.

The principle is the same under both statutes. Until admitted in conformity with the Immigration Law he can acquire no rights of citizenship under either statute.

The petitioner cites and places much emphasis upon the case of *U. S. ex rel. Sejnensky* vs. *Tod,* 285 Fed. 523, in which a woman as much disqualified to enter under the terms of the Immigration Law, as is the defective minor alien, here was held to have acquired citizenship by marriage to a citizen while in similar constructive possession of the Immigration Authorities.

The Sejnensky case is clearly distinguishable from the case at bar. Prior to the repealing act of 1922, an alien woman, under Section 1994 of the Revised Statutes, *automatically* became a citizen upon her marriage to a citizen, whether married abroad or in this country, without condition or qualification (*U. S.* vs. *Williams,* 173 Fed. 626; 184 Fed. 322).

There is, however, a condition precedent as to the citizenship of the minor alien, viz: "dwelling" in the country under Section 2172 of the Revised Statutes, or "beginning" to "permanently reside in the United States," under the Act of 1907. No such condition precedent was required for the citizenship of an alien woman who married a citizen. The Sejnensky case, therefore, lacks such analogy as to be controlling here.

The relator also suggests that the United States is estopped from asserting that the relator is not a citizen, and claims that the recital of his name in the Naturalization certificate of his father is a judgment binding upon the United States, and only subject to attack in a direct proceeding for that purpose. This claim is of no avail as such recitals in the certificate of naturalization are merely statutory formalities, and are in reality declarations by alien parent in his own behalf and do not estop the Government.

The relator insists that he is not feeble minded. He also asserts that he did not have a fair examination by the Board of Medical Officers of the U. S. Public Health Service, because there was prejudice and ill-will aroused about him by certain newspaper articles, which he asserts prevented his having a fair examination.

It appears from the record in this case, that the examination made on his arrival at the port of New York on January 27, 1921, was made by examining surgeons, Wildman, Faughnan, and Scott. The examination of February 28, 1922, was made by examination surgeons Wildman, Faughnan, and Shockley.

On April 27, 1922, on his appeal, he was examined by a Board of Medical Officers of the U. S. Public Health Service, consisting of Drs. Wildman, Sandidge, and Loughran, at which examination Dr. Locke, of Syracuse, was present as medical expert in behalf of the petitioner and produced before the examining surgeons his opinion and the records of the work of the plaintiff in the public schools of Syracuse.

He was later examined on April 2, 1923, by another Board of Medical Officers of the U. S. Public

Health Service, in the presence of Dr. Banford, another expert from Syracuse, who was present in behalf of the relator, which examination was made by Drs. Weldman, Fuller, and Loughran.

All of these eight Federal examining surgeons who examined him on these four different examinations, from January 27, 1921, to April 2, 1923, decided that he was feeble-minded, and the examiners at all of the last three examinations confirmed the previous findings that the relator was feeble-minded.

It appears by the record that examining surgeons received and considered all of the evidence of his mental condition that was offered on his behalf.

It is difficult to see what more these examining surgeons could have done to give this boy a full and fair examination, and his friends an opportunity to prove his assertion that he was not feeble-minded.

The petition sets forth as ground for the assertion that the relator did not get a fair hearing and that the respondent was prejudiced against the relator, an article in a New York paper of the 1st of April, 1923, the day before the last examination, in which the respondent is represented as assailing "politicians and lawyers who are making a mockery of immigration laws," and asserting that there were 83 cases then pending, of which that of the relator was one, and in which the Commissioner is said to have asserted that "the facts in the Goldman case were incontrovertible and that the boy, as a Rumanian subject, should be deported."

The respondent was not one of the examining surgeons of this Board of Medical Officers of the U. S. Public Health Service who passed on this relator's mentality, and he had no power of ap-

pointment of these Medical Officers to, or their removal from the Immigration Service. Nothing warrants any inference that these Medical Officers were in any way influenced by this newspaper article. Even if we assume that the respondent's views were correctly represented by the newspaper article, and further assume that the article came to the attention of the examining surgeons prior to the examination of April 2, 1923, this Court can not assume or find therein any reasonable ground for believing that the three examining surgeons on the 2nd day of April, were prejudiced in their findings, and did not give the relator a fair examination. True, Dr. Banford, of Syracuse, was present, and disagreed with them and was of the opinion that the relator " in the ordinary course of nature will advance mentally to a point where he will be at least self-supporting." But that was not a very strong statement and in any event it was their duty, while taking all the evidence into consideration, to decide according to their own judgment.

There is no legal basis, therefore, for holding that the relator did not have a fair and unprejudiced hearing. There was evidence to support the finding of the Board of Medical Officers, and of the Board of Special Inquiry.

The findings in deportation and exclusion proceedings as to defective aliens under Sections 3 are final where there is evidence to support it.

> *Low Wah Suey* vs. *Backus*, 225 U. S. 460; *U. S.* vs. *Uhl*, 271 Fed. 676; *Skeffington* vs. *Katzeff*, 277 Fed. 131; *U. S. ex rel. Fink* vs. *Tod* (decision by Judge Hough not reported); Writ dismissed and relator remanded.

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